Supreme Court, U.S.
FILED
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No. 03 903

In The
Supreme Court of the United States

LANTZ WELCH and LANTZ WELCH, P.C.,

Petitioners,

vs.

GRANT DAVIS, SCOTT BETHUNE, THOMAS JONES, TIM BRAKE, TIM BRAKE, P.C. and DAVIS, BETHUNE & JONES, L.L.C.,

Respondents.

On Petition For Writ Of Certiorari To The Missouri Court Of Appeals – Western District

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

May a court disregard a parties' right to arbitrate a dispute under the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* by claiming that the denial of that right is "harmless error?"

PARTIES

The caption of this case contains the names of all parties.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioner Lantz Welch, P.C. states that it has no parent or subsidiary companies.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Lantz Welch and Lantz Welch, P.C. respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Missouri Court of Appeals for the Western District entered in this proceeding on June 10, 2003.

OPINIONS BELOW

The opinion of the Missouri Court of Appeals for the Western District that gives rise to this petition is reported at 114 S.W.3d 285, and is reprinted in the Appendix at App. 1-13. The Missouri Court of Appeals' order denying rehearing and rehearing en banc or transfer to the Missouri Supreme Court (App. 29) is unreported. The Missouri Supreme Court's order denying transfer from the Missouri Court of Appeals (App. 30) is also unreported.

JURISDICTION

The judgment of the Missouri Court of Appeals sought to be reviewed was entered on March 10, 2003. Petitioner timely filed a Motion for Rehearing and Rehearing en banc and an Alternative Application for Transfer to the Missouri Supreme Court on June 25, 2003, which were denied on July 29, 2003. App. 29. Petitioner then timely filed an Application for Transfer in the Missouri Supreme Court on August 12, 2003, which was denied on September 30, 2003. App. 30. This Court has jurisdiction under 28 U.S.C. § 1257.

STATUTORY PROVISIONS INVOLVED

The relevant provision of the Federal Arbitration Act, 9 U.S.C. § 2, provides in pertinent part:

> § 2. Validity, irrevocability and enforcement of agreements to arbitrate
>
> A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

STATEMENT OF THE CASE

Petitioner Lantz Welch has practiced law in Kansas City, Missouri for over 40 years. For many of those 40 years, Welch's active trial practice was operated through his professional corporation, Petitioner Lantz Welch, P.C. To assist with his representation of Lantz Welch, P.C. clients, Welch associated with four other lawyers. Those lawyers – Respondents Timothy L. Brake, Grant Davis, Scott Bethune and Thomas Jones – all joined Lantz Welch, P.C. over the course of the 1980's and 1990's.

Instead of producing their own business, Brake, Davis, Bethune and Jones worked on Lantz Welch, P.C. cases. Welch financed the law practice in its entirety and advanced the funds for the firm's contingent-fee litigation.

The entirety of the risk of the firm's contingent-fee practice therefore fell on Welch.

After operating under this arrangement for many years, Welch received a letter in December 2000 informing him that Brake, Davis, Bethune and Jones were leaving Lantz Welch, P.C. Brake, who wrote the letter, stated that he was taking all Lantz Welch, P.C. cases with him. In doing so, Brake relied on a 1992 written contract that governed the association between Welch and Brake.

Although Brake claims to have "withdrawn" all the cases under the contract, every single one of the former clients of Lantz Welch, P.C. are clients of Davis, Bethune and Jones through their limited liability company, Respondent Davis, Bethune & Jones, L.L.C. Brake has never had a contract for representation with any of the clients at issue. Brake is instead associated with Davis, Bethune & Jones, L.L.C. as "of counsel," and he continues to work on the cases based on that association alone.

After leaving Lantz Welch, P.C., Brake, Davis, Bethune and Jones all maintained that Welch was not entitled to any part of the fees that the appropriated cases would generate.[1] When efforts at an immediate arbitration failed after Davis, Bethune and Jones refused to participate, Welch filed this lawsuit in Missouri state court to

[1] The decision not to compensate Welch in any form included the approximately $12 million in attorneys' fees that were collected on just one of the cases involved in the dispute. There are over 50 other cases at issue, which places over $50 million in attorneys' fees at stake.

compel arbitration.[2] Welch moved to compel Brake to arbitrate based on the arbitration clause in their 1992 contract. Welch sought to include Davis, Bethune and Jones and their limited liability company based on their alleged status as non-signatory agents of Brake or third-party beneficiaries under the contract. Welch also asserted an alternative quantum meruit claim against Davis, Bethune and Jones to recover the fees at issue.

After Welch filed this action, Brake filed his own application to compel an arbitration between just Brake and Welch. The trial court granted Brake's application to compel arbitration and denied Welch's application, concluding that Davis, Bethune and Jones and their limited liability company were not required to arbitrate. App. 14-21.

Welch immediately appealed the trial court's arbitration ruling to the Missouri Court of Appeals. While that appeal was pending, the arbitration between Welch and Brake took place. Although disclaiming any role as proper parties to the arbitration, Davis, Bethune and Jones provided extensive testimony at the arbitration in favor of Brake. The arbitration panel ruled in favor of Brake, finding that he was entitled to withdraw the Lantz Welch, P.C. cases.

After the arbitration, Brake filed an application with the trial court to confirm the award. Davis, Bethune and Jones simultaneously filed a motion for summary judgment on Welch's quantum meruit claim against them,

---

[2] Welch's application for arbitration relied on both the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* and the Missouri Arbitration Act, R.S. Mo. § 435.350 *et seq.* App. 31-48.

contending that Welch was no longer a real party in interest to the claim and principles of res judicata barred the claim. The trial court confirmed the arbitration award. App. 22-24. The trial court also entered summary judgment on the quantum meruit claim based on the apparent view that the arbitration award in favor of Brake extinguished the claim. App. 25-28.[3]

Welch then filed a separate appeal challenging the trial court's confirmation of the arbitration award and summary judgment ruling. After consolidating the two appeals, the Missouri Court of Appeals, in a per curiam opinion, affirmed the trial court. App. 1-13. In first raising the federal question sought to be reviewed, the court of appeals held that even if Welch's argument was correct that the trial court should have compelled Davis, Bethune and Jones to arbitrate, the error was harmless. App. 5-6. The court of appeals reasoned that Welch suffered no apparent prejudice from the failure to compel Davis, Bethune and Jones to arbitrate and that "[e]rror without prejudice [was] not reversible error." App. 5-6. The court of appeals also upheld the trial court's confirmation of the arbitration award in favor of Brake. App. 6-10. Finally, reasoning that Welch was no longer a real party in interest to his quantum meruit claim, the court of appeals affirmed the trial court's entry of summary judgment on that claim. App. 10-13.

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[3] As a result of the trial court's ruling, Welch has never had an opportunity to present the merits of his position before any tribunal. And the defendants who actually withdrew, and are in possession of, the former Lantz Welch, P.C. cases – Davis, Bethune and Jones – have effectively avoided consideration of the merits of their position.

In response to the court of appeals' decision, Welch filed a Motion for Rehearing and Rehearing En Banc and an Alternative Application for Transfer to the Missouri Supreme Court. App. 49-76. The court of appeals denied both the Motion for Rehearing and Rehearing En Banc and the Alternative Application for Transfer on July 29, 2003. App. 29. Welch then sought review in the Missouri Supreme Court by filing an Application for Transfer with that court. App. 77-91. Welch asked the Missouri Supreme Court to decide whether the court of appeals erred in its application of the harmless error doctrine to defeat a parties' claimed right to arbitration under the FAA. App. 79, 86-88. On September 30, 2003, the Missouri Supreme Court denied transfer. App. 30.

REASONS FOR GRANTING THE PETITION

I. The Court of Appeals' Decision Directly Conflicts with Supreme Court Precedent and Creates a Split of Authority in the United States Courts of Appeals and State Courts of Last Resort.

The Court should hear this case because it concerns the ability of a party to properly enforce its federally-granted, statutory-based right to arbitrate in the courts of this country. It specifically raises the important federal question whether a court can apply a principle such as the harmless error doctrine to summarily deny a party its right to arbitrate under the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.* Although decisions of this Court recognize that state courts cannot apply state law to defeat the right to arbitration found in the FAA, here the Missouri Court of Appeals departed from this principle.

The court of appeals' decision to reject as harmless the claimed error in the denial of Welch's arbitration request therefore conflicts with this Court's precedent. In addition, the court of appeals' application of the harmless error doctrine departs from numerous opinions of United States courts of appeals and state courts of last resort. Unlike here, those courts enforce the right to arbitration found in the FAA without regard to harmless error analysis. The conflict created both with Supreme Court precedent and with the circuit and state courts should be corrected.

A. The State Court Decision Below Infringes On An Important Federal Right to Arbitration In A Way That Directly Conflicts With This Court's Precedent.

The Missouri Court of Appeals determined that any error resulting from the denial of Welch's motion to compel arbitration was harmless under state law. This Court's decisions, however, hold that the FAA requires state courts, even in the face of contrary state law, to enforce arbitration agreements covered by the FAA. The court of appeals nevertheless decided to apply a state law principle – the harmless error doctrine – to summarily dismiss the federal statutory right found in the FAA.

As an initial matter, it is clear that the FAA applies to the arbitration agreement at issue. Section 2 of the FAA applies where there is a "contract evidencing a transaction involving commerce." 9 U.S.C. § 2; *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 277 (1995). The Court has interpreted the term "involving commerce" as used in the FAA to be the functional equivalent of the term of art "affecting commerce," which "ordinarily signal[s] the broadest permissible exercise of Congress' Commerce Clause

power." *Citizens Bank v. Alafabco, Inc.*, ___ U.S. ___, 123 S.Ct. 2037, 2040 (2003). The FAA therefore "encompasses a wider range of transactions than those actually . . . 'within the flow of interstate commerce.'" *Id.* (quoting *Allied-Bruce*, 513 U.S. at 273).

The court of appeals never addressed the issue of whether the FAA or the Missouri Arbitration Act, R.S. Mo. § 435.350 *et seq.* applies in this case. As Welch argued below, however, between the two the FAA applies. The attorneys involved in this dispute represented Lantz Welch, P.C. clients outside of Missouri, including Kansas. And the Court has recognized that engaging in interstate business satisfies the FAA's "involving commerce" test. *Citizens Bank*, ___ U.S. at ___, 123 S.Ct. at 2040. Missouri courts have similarly recognized as much in finding the FAA applicable to a dispute involving an accounting firm that served clients located in both Illinois and Missouri. *Mueller v. Hopkins & Howard, P.C.*, 5 S.W.3d 182, 185 (Mo. App. 1999). The arbitration provision at issue is therefore enforceable pursuant to the FAA.

The "central purpose" of the FAA is "to ensure 'that private agreements to arbitrate are enforced according to their terms.'" *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 53-54 (1995) (quoting *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989)). The FAA "establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983). This Court has recognized that the FAA not only "declared a national policy favoring arbitration" but also "withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting

parties agreed to resolve by arbitration." *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984).

The Missouri Court of Appeals' decision defeats the purposes of the FAA. The court of appeals applied the harmless error doctrine to resolve Welch's claims in a judicial forum when the dispute should have been resolved by arbitration. It therefore exercised a power that the FAA has withdrawn.

Even if excluding Davis, Bethune and Jones from the arbitration was harmless error,[4] the court of appeals still could not apply that doctrine to defeat Welch's right under the FAA to arbitrate the dispute with the signatories to the arbitration agreement and the signatories' agents.[5] In *Southland Corp. v. Keating*, 465 U.S. 1 (1984), the Court held that § 2 of the FAA applies in state as well as federal courts. *Id.* at 12. " 'Section 2 is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural

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[4] Such an assumption was incorrect to begin with. Welch was prejudiced for several reasons, including the fact that without Davis, Bethune and Jones as parties to the arbitration, Welch was prevented from fully explaining to the arbitration panel that it was Davis, Bethune and Jones, not Brake, who had withdrawn the cases from Lantz Welch, P.C. Additionally, had Davis, Bethune and Jones appeared as parties and not merely witnesses, their cross-examinations, and all other aspects of Welch's arbitration strategy would have taken a different tack.

[5] Under both federal and Missouri law, non-signatory agents are bound by arbitration agreements signed by their principals. *See Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 7 F.3d 1110, 1122 (3d Cir. 1993); *Byrd v. Sprint Communications Co., L.P.*, 931 S.W.2d 810, 815 (Mo. App. 1996); *Tractor-Trailer Supply Co. v. NCR Corp.*, 873 S.W.2d 627, 630 (Mo. App. 1994).

policies to the contrary.'" *Perry v. Thomas*, 482 U.S. 483, 489 (1987) (quoting *Moses H. Cone*, 460 U.S. at 24). The Court has held that the FAA displaces state law to the contrary. *Allied-Bruce*, 513 U.S. at 280 (citing *Southland Corp.*, 465 U.S. at 10-16; *Perry*, 482 U.S. at 489-92). State law is preempted "to the extent that it actually conflicts with federal law – that is, to the extent that it 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Volt*, 489 U.S. at 477 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

Applying these principles, the Court in *Perry* examined whether the FAA preempted a California statute that allowed actions for the collection of wages to be maintained regardless of whether an arbitration agreement existed. *Id.* at 484. The Court found that the clear federal policy of rigorously enforcing arbitration agreements placed § 2 of the FAA in conflict with the California statute. *Id.* at 490-91. Because the California statute provided a judicial forum for wage disputes to the exclusion of arbitration, the Court concluded that the statute must give way under the Supremacy Clause. *Id.* at 491.

A similar result was reached in *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681 (1996). *Casarotto* involved a Montana statute declaring arbitration clauses unenforceable unless an arbitration notice was prominently displayed on the contract. *Id.* at 683. The Court found that the state law conflicted with § 2 of the FAA because it conditioned the enforceability of arbitration agreements on the special notice requirement. *Id.* at 687. The Court therefore held that the Montana statute was preempted by federal law. *Id.* at 687-88.

The court of appeals' application of the harmless error doctrine, like the state statutes at issue in *Perry* and *Casarotto*, conflicts with § 2 of the FAA. Without even deciding whether arbitration would be required under the FAA, the court of appeals discarded Welch's right to arbitration. The harmless error doctrine was thus used to summarily defeat the right found in § 2 of the FAA.[6]

In sum, there is no basis to support the conclusion that the denial of the right to arbitration found in § 2 of the FAA could ever be harmless error, let alone a finding that such a result could be squared with federal law. The court of appeals' use of the harmless error doctrine directly conflicts with the Court's decisions establishing the pre-emptive effect of federal law in these circumstances. The Court should grant certiorari to correct this error.

B. This Case Squarely Presents a Conflict in the Circuit Courts and State Courts of Last Resort Over the Applicability of Harmless Error Analysis to the FAA's Right to Arbitration.

The court of appeals' decision creates a conflict in the United States courts of appeals and state courts of last

[6] The fact that the present case involves a court decision, and not a statute as in *Perry* and *Casarotto*, makes no difference. The Court has recognized in this context that courts may not accomplish what the state legislature cannot. *See Casarotto*, 517 U.S. at 687 n.3; *Perry*, 482 U.S. at 492 n.9. A state legislature's ban on arbitration where its denial would result in only harmless error would surely be preempted under the holdings in *Perry* and *Casarotto*. There is no basis to reach a different result in this case simply because the actions of a court are involved.

resort. The conflict is over the ability of a court – regardless of federal preemption – to apply a principle like the harmless error doctrine to deny a statutory right like that found in the FAA. Counsel for Welch was unable to locate any United States court of appeals' decision or the decision of a state court of last resort applying the harmless error doctrine, as the court of appeals did here, to summarily deny a party the right to arbitration found in the FAA. In contrast, numerous decisions of both circuit courts and state courts of last resort enforce the FAA's right to arbitration without any indication that harmless error analysis even applies. *See Astra Oil Co., Inc. v. Rover Navigation, Ltd.*, 344 F.3d 276, 282 (2d Cir. 2003); *John B. Goodman Ltd. P'ship v. THF Constr., Inc.*, 321 F.3d 1094, 1098 (11th Cir. 2003); *Boomer v. AT&T Corp.*, 309 F.3d 404, 424 (7th Cir. 2002); *Personal Sec. & Safety Sys. Inc. v. Motorola Inc.*, 297 F.3d 388, 396 (5th Cir. 2002); *Snowden v. Checkpoint Check Cashing*, 290 F.3d 631, 639 (4th Cir. 2002); *Larry's United Super, Inc. v. Werries*, 253 F.3d 1083, 1086 (8th Cir. 2001); *Williams v. Imhoff*, 203 F.3d 758, 767 (10th Cir. 2000); *Harris v. Green Tree Fin. Corp.*, 183 F.3d 173, 184 (3d Cir. 1999); *Bercovitch v. Baldwin Sch., Inc.*, 133 F.3d 141, 156 (1st Cir. 1998); *Conseco Fin. Corp. – Alabama v. Boone*, 838 So.2d 370, 373 (Ala. 2002); *Skewes v. Shearson Lehman Bros.*, 829 P.2d 874, 882 (Kan. 1992); *Flanagan v. Prudential-Bache Sec., Inc.*, 495 N.E.2d 345, 350 (N.Y. 1986); *Sentry Sys., Inc. v. Guy*, 654 P.2d 1008, 1009 (Nev. 1982). Contrary to the explicit recognition these courts give the statutory right to arbitrate under the FAA, the court of appeals shunned the FAA based on its misapplication of the harmless error doctrine.

The conflict over the application of the harmless error doctrine to the FAA's right to arbitration presents an issue

of great legal and practical importance. Through its application of the harmless error doctrine, the court of appeals was able to sidestep completely the question of whether arbitration was required under the FAA. If such a result is allowed to stand, courts across the country will be encouraged to simply avoid difficult issues of arbitrability altogether in favor of the simple expedient of finding "harmless error." The effect will be a substantial diminishment of the strong federal policy in favor of arbitration.

Without resolution of the conflict by this Court, the disagreement created by the court of appeals will likely proliferate. The Court should grant certiorari to remove the conflict and its effect on the important federal right to arbitration under the FAA.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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December 19, 2003

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[SEAL]

In the

Missouri Court of Appeals

Western District

LANTZ WELCH, and LANTZ WELCH, P.C. Appellants, v. GRANT DAVIS, SCOTT BETHUNE, THOMAS JONES, TIM BRAKE, TIM BRAKE, P.C., and DAVIS, BETHUNE AND JONES, L.L.C., Respondents.	WD 61089 (consolidated WD 61731) Filed: June 10, 2003

APPEAL FROM THE CIRCUIT COURT OF JACKSON COUNTY

The Honorable Frank D. Connett, Jr., Judge

BEFORE Ronald R. Holliger, Presiding Judge, Paul M. Spinden, Judge, and James M. Smart, Judge

PER CURIAM

This case involves consolidated appeals arising from a dispute over fees between Lantz Welch and his firm, Lantz Welch, P.C., and Tim Brake, Grant Davis, Scott Bethune, and Thomas Jones, attorneys who formerly practiced law in association with Welch's firm. The dispute centers on an agreement that Welch entered into with Brake on January 1, 1992. The agreement governed their association and said:

> In the event this Agreement is terminated by either party, any law business may be withdrawn by [Brake] with the understanding that [Brake] shall first reimburse [Welch] any amounts of monies previously advanced by [Welch] on said matters, and it is understood by [Welch] that [Welch] shall not participate in any legal fees in said matters unless the fee therefore has actually been collected and is deposited in the accounts of [Welch].
>
> . . . .
>
> Upon any dissolution of this Agreement, if there is any dispute concerning the matters covered by this Contract between the parties hereto, or their heirs or legatees, the matters shall be referred to a single arbitrator, if the parties or their representatives agree upon one; otherwise, to a board of three arbitrators, of which one shall be selected by each party or his representative to the difference and a third shall be selected by those two; and the decision and award of each single arbitrator or any two of such board, as the case may be, shall be final and binding upon said parties and their respective representatives.

Davis, Bethune, and Jones were not parties to this agreement or any similar agreement with Welch.

On December 5, 2000, Brake informed Welch that he was terminating the agreement and their association. In the letter, Brake said that he was withdrawing cases, which he identified in an attachment to the letter, and that he had agreed with Davis, Bethune, and Jones that they would end their association with Welch and form a new law practice in which Brake anticipated having an association.

A dispute erupted between Welch and the new firm, Davis, Bethune and Jones, L.L.C., concerning legal fees in the cases withdrawn by Brake. The dispute centered on a case in which Davis, Bethune, and Jones, L.L.C., had earned approximately $12 million in attorney fees. After Brake informed Welch that he was withdrawing the cases, Davis sent the clients letters seeking their transfer of their cases from Welch to Davis, Bethune and Jones. In a letter to Kimberly Alcorn, Davis said:

> Mr. Welch has announced that he is semi-retired from practicing law. I am writing to inform you that Lantz Welch will not be with our new law firm. I will be practicing with all the same lawyers except Lantz and the new firm name will be Davis, Bethune & Jones, LLC. I will continue to practice at the same location and my telephone and fax numbers remain the same. Mr. Welch can be reached at (816) 587-3773.
>
> I, along with Tom Jones and Tim Brake have handled your case. We would like to continue to represent you. You are not obligated to have me continue to represent you. You can retain another attorney if you wish, including Mr. Welch.
>
> If you want me to continue to represent you, please sign the enclosed letter indicating your desire. The amount of attorney fees you are obligated to pay will remain the same as the previous Contract of Employment of Attorneys.

Enclosed with this letter was a simple form for Kimberly Alcorn to sign. It said, "I would like for Tim Brake, Grant Davis, Scott Bethune and Tom Jones to represent me in my legal matter." Alcorn signed the form on January 26, 2001.

In April 2001, Welch sued, seeking an order to compel arbitration of the fee dispute among all parties, including Davis, Bethune, and Jones, and, in the alternative, for relief in *quantum meruit.* In response, Brake filed his own application to compel arbitration, but to exclude Davis, Bethune, and Jones as parties to the arbitration. The circuit court granted Brake's application. When the circuit court denied Welch's request that the circuit court reconsider its decision to exclude Davis, Bethune, and Jones as parties to the arbitration, Welch appealed.

On April 8 and 9, 2002, while Welch's appeal was pending, a panel of three arbitrators arbitrated Welch and Brake's dispute. On April 10, the panel issued its award for Brake. In a 2-1 decision, the panel found that Welch and his firm were not entitled to any of the law business withdrawn by Brake pursuant to the January 1, 1992, agreement and were not entitled to share in any of the legal fees paid in connection with that business.

On May 21, 2002, Brake, Davis, Bethune, and Jones filed in circuit court a motion for summary judgment on Welch's petition for relief in *quantum meruit.* The circuit court confirmed the arbitration award and granted summary judgment. Welch filed a second appeal.

The first appeal raises the issue of whether or not the circuit court erred in not compelling Davis, Bethune, and Jones to arbitrate the dispute that Welch and Brake had concerning their contract. Welch argues that the circuit court should have compelled Davis, Bethune, and Jones to arbitrate, even though they did not sign the contract,

because they either were Brake's agents or were third-party beneficiaries to the contract.[1]

Even if Welch is correct – and the record leaves much room for doubting that he is – we discern no prejudice to Welch resulting from Davis, Bethune, and Jones' not being compelled to arbitrate. Error without prejudice is not reversible error. *Neavill v. Klemp,* 427 S.W.2d 446, 448 (Mo. 1968). The only prejudice that Welch articulates is that to "completely understand the factual basis and merits of [Welch's and Brake's] dispute over legal fees, Davis, Bethune and Jones [were necessary] parties to the

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[1] In support of his contention, Welch relies on *Byrd v. Sprint Communications Company, L.P.,* 931 S.W.2d 810, 814-15 (Mo. App. 1996), in which this court declared, " 'Federal courts have extended the scope of arbitration clauses, signed by a principal party, to non-signatory agents.' [*Tractor-Trailer Supply Company v. NCR Corporation,* 873 S.W.2d 627, 630 (Mo. App. 1994) (citing *Pritzker v. Merrill Lynch Pierce Fenner and Smith, Inc.,* 7 F.3d 1110, 1122 (3d Cir. 1993)]. Our colleagues in the Eastern District appear to have adopted this rule as well [in *Tractor-Trailer*]. This court has adopted the rule in the context of allowing non-signatory agents to enforce an arbitration agreement where the agents were co-defendants with the principal who was a signatory to the arbitration agreement. *Madden v. Ellspermann,* 813 S.W.2d 51, 53 (Mo. App.1991). Because this court has permitted agents to take advantage of arbitration agreements which they were not a party to, consistency would dictate we hold non-signatory agents bound by arbitration agreements signed by their principals. We will adopt such a rule." We painted with too broad a brush in *Byrd.* The issue has nothing to do with consistency but with the application of proper principles of contract and agency law. Those principles will, under the proper circumstances, permit a party to an arbitration agreement to compel an agent of the other party to arbitrate a dispute although the agent did not enter into the agreement. Assuming that they were agents – the record does not establish clearly that they were – we discern nothing about that status that would compel them to submit to arbitration.

arbitration of the dispute," and that he will be subject "to inconsistent results if this dispute is handled in different forums." He does not explain, however, why Davis, Bethune, and Jones' presence as witnesses at the arbitration proceeding was not sufficient to provide the factual basis. We do not accept the contention that compelling them to arbitrate was necessary to his establishing a full factual basis of his dispute with Brake. As for the inconsistent results, the results seem to have been consistent in this case, and, contrary to his concern, inconsistent results seems to be precisely what he desires: Having lost all to Brake, he is hoping to regain some of that loss from Davis, Bethune, and Jones. Even assuming that excluding Davis, Bethune, and Jones from the arbitration was error, it was harmless. Welch suffered no apparent prejudice.

In his second appeal, Welch challenges the circuit court's order to confirm the arbitration award. Our review of the circuit court's decision to confirm an arbitration award is governed by *Murphy v. Carron,* 536 S.W.2d 30, 32 (Mo. banc 1976). We will affirm the circuit court's decision unless it is not supported by substantial evidence, or it is against the weight of the evidence, or it erroneously declares or applies the law. *Heineman v. Charno,* 877 S.W.2d 224, 227 (Mo. App. 1994); *Sheffield Assembly of God Church,* 870 S.W.2d 926, 929 (Mo. App. 1994).

Two different bodies of law could govern this dispute: the Uniform Arbitration Act, § 435.350 *et seq.,* and the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* The latter applies to contracts evidencing transactions involving or affecting interstate commerce. *Edward D. Jones and Company v. Schwartz,* 969 S.W.2d 788, 793 (Mo. App. 1998). The grounds for setting aside an arbitration award vary between these two bodies of law. The federal law

provides more bases for vacating an award. We need not resolve this issue, however, because we conclude that the premises on which Welch rests for setting aside the arbitrators' award are incorrect.

Welch contends that the arbitration award should have been set aside because it purported to enforce an attorney-fee sharing agreement that was contrary to public policy and unenforceable as a matter of law. Welch argues that the award violated two rules of professional conduct, Rules 4-1.5(e) and 4-5.6.[2]

The claim appears disingenuous. In his first appeal, Welch complains that the circuit court erred by not compelling Davis, Bethune, and Jones to arbitrate under the very agreement that he now claims is void. Nevertheless, we consider his point.

Welch argues that his agreement with Brake violated Rule 4-1.5(e) because its allocation of fees did not take into account the proportion of services performed by each lawyer. The rule, however, imposes qualifications on the right to divide a legal fee only when "lawyers who are not

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[2] Rule 4-1.5(e) says, "A division of fee between lawyers who are not in the same firm may be made only if: (1) the division is in proportion to the services performed by each lawyer or, by written agreement with the client, each lawyer assumes joint responsibility for the representation; (2) the client is advised of and does not object to the participation of all the lawyers involved; and (3) the total fee is reasonable." Rule 4-5.6 says, "A lawyer shall not participate in offering or making: (a) a partnership or employment agreement that restricts the rights of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement; or (b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a controversy between private parties."

in the same firm" divide the fee. Rule 4-1.5(e). A "firm" is a "[b]usiness entity or enterprise." BLACK'S LAW DICTIONARY 634 (6th Ed. 1990). Brake associated himself with Welch in the practice of law at the law offices of Lantz Welch, P.C. Regardless of the nature of their business relationship – whether or not Brake was an independent contractor as Welch contends – they held themselves out to their clients and practiced together as a single, collective business entity. Welch's apparent belief that they were "not in the same firm" for purposes of the rule governing fee splitting is mistaken.

Welch also believes that his agreement with Brake violated Rule 4-5.6 because it restricted the right to practice following the termination of their relationship. Welch argues that the agreement can be read as granting Brake the power to withdraw law business and preventing Welch from representing a given client without regard for the client's desire. Although the contract is open to Welch's construction, the Supreme Court instructed long ago:

> If the contract can be performed without any violation of law, then it is only a natural and legal presumption that it will be so performed, or at least there is no legal presumption that it will not be so performed. Where a contract is fairly open to two constructions, by one of which it would be lawful and the other unlawful, the former construction should be adopted. But when the language imports illegality, the courts should not construe it in a different sense, for that would be to make a contract for the parties which they have not made themselves.

State ex rel. Clayton v. Bland, 256 S.W. 757, 758 (Mo. banc 1923) (quoting *Lamar Water and Electric Light Company v. City of Lamar*, 26 S.W. 1025, 1029 (Mo. 1894)).

Although Welch's and Brake's agreement granted Brake the power to withdraw "law business," Brake could do so only in compliance with the law and his ethical obligations. He was obligated to obtain the clients' consent to withdraw the cases, and this is what happened. Davis, on behalf of Davis, Bethune and Jones, L.L.C., sent letters to the clients involved and indicated that he, Jones, and Brake, had been handling their cases and would like to continue to represent them. The letter also informed the clients that they had the right to be represented by the lawyer of their choice, including Welch. The clients ultimately determined whether their cases would be withdrawn by Brake. We find nothing in the record suggesting that Brake or the arbitrators interpreted the contract in a manner that allowed Brake to prohibit Welch and his firm from representing a client that wanted them.

Welch also contends that the circuit court should not have confirmed the arbitration award because the arbitrators exceeded their power by considering an oral agreement that was outside the scope of arbitration. Welch argues:

> Despite having defined the arbitration [by asking only for a declaration of the provision concerning his authority to withdraw law business], and testifying under oath that he was not seeking enforcement of an oral agreement, Brake (along with Davis, Bethune and Jones, who all testified at the arbitration) proceeded to submit two days of testimony about an alleged oral "fill-the-pot" agreement. . . . Although Welch objected to the

> admission of such evidence, . . . the arbitration panel nevertheless allowed its admission and obviously took that evidence into consideration in rendering its award. The panel therefore considered matters beyond those submitted to it for decision.

Arbitrators' authority is limited to deciding matters that are in the scope of the arbitration agreement and have been submitted to them. If they decide matters beyond this scope, they have exceeded their authority. *Hayob v. Osborne,* 992 S.W.2d 265, 269 (Mo. App. 1999); *Schwartz,* 969 S.W.2d at 794.

The arbitrators arbitrated this dispute in accordance with Welch's and Brake's agreement, and they decided only matters within the scope of the issues submitted to them; that is, whether or not the agreement allowed Brake to withdraw the cases and collect the legal fees. That they may have considered evidence that should not have been admitted in deciding the submitted issue is of no consequence. This is an issue of legal error, and the courts will not consider claims of legal error in arbitration proceedings. *Schwartz,* 969 S.W.2d at 793-94. *See also Lorenzini v. Group Health Plan, Inc.,* 753 S.W.2d 106, 108 (Mo. App. 1988) ("An arbitrator's mistake of law . . . does not constitute an act in excess of the arbitrator's powers.").

In his remaining point on appeal, Welch challenges the circuit court's grant of summary judgment for Davis, Bethune, and Jones on his request for relief in *quantum meruit.* Our review is *de novo. ITT Commercial Finance Corporation v. Mid-America Marine Supply Corporation,* 854 S.W.2d 371, 376 (Mo. banc 1993). We review the record in the light most favorable to the party against whom the

judgment was entered and accord him the benefit of all reasonable inferences. *Id.*

The criteria on appeal for testing summary judgment are no different than those employed by the circuit court originally ruling on the motion. *Id.* We will uphold summary judgment only if the movant establishes that the parties are not contesting a genuine issue of material fact and that he is entitled to judgment as a matter of law. Rule 74.04(c)(3). Both criteria are requisite to summary judgment. "The key to summary judgment is the undisputed right to judgment as a matter of law; not simply the absence of a fact question." *ITT,* 854 S.W.2d. at 380.

Davis, Bethune, and Jones argue that summary judgment was proper because Welch and his firm are not the real parties in interest to the *quantum meruit* action because they were not entitled to participate in any fees from the law business that Brake withdrew. They contend that Brake possessed, as a matter of contract, all rights that Welch may have had in the fees and that Brake is the only one who can enforce those rights. Davis, Bethune, and Jones assert that the arbitrators' decision confirmed this by declaring that Brake alone had a right to all legal fees.

We agree. Real parties in interest are persons who are directly interested in a lawsuit's subject matter and are entitled to maintain the action. *Janssen v. Guaranty Land Title Company,* 571 S.W.2d 702, 706 (Mo. App. 1978). Closely related is the doctrine of standing. *See Shannon v. Hines,* 21 S.W.3d 839, 841 (Mo. App. 1999). Standing requires that a party seeking relief have a legally cognizable interest in the subject matter of his suit and a threatened or actual injury. *Darrington v. George,* 982 S.W.2d

823, 825 (Mo. App. 1998). The interest at stake may be slight, attenuated, or remote. *Ste. Genevieve School District R-II v. Board of Aldermen of the City of Ste. Genevieve,* 66 S.W.3d 6, 10 (Mo. banc 2002).

In granting summary judgment, the circuit court issued findings of fact and conclusions of law stating that, because the arbitrators determined that the agreement transferred all of Welch's interest in the fees to Brake, Welch "has no legal interest" in them. The circuit court reasoned, "[T]hat these fees are now in the hands of defendants Davis, Bethune and Jones is of no lawful concern of [Welch]." We agree. The arbitrators' award determined that any right Welch may have had to the fees belonged to Brake. If Welch had no right to the fees, he no longer had a legally cognizable interest susceptible of protection via an action in *quantum meruit.* His interest in the subject matter is non-existent.[3]

Welch counters that he alone had a contractual relationship with the clients involved with the law business withdrawn by Brake, and that Davis, Bethune, and Jones – not Brake – took the cases from him, entered into their own contract, and collected the fees. The issue, however, of who was entitled to the attorneys fees under the agreement was presented to the arbitrators who

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[3] Welch argues in his reply brief that "Brake's non-receipt of the attorneys' fees at issue is the reason that the arbitration award in his favor, even if ultimately upheld, has no effect on Welch's status as a real party in interest to a *quantum meruit* claim against Davis, Bethune and Jones." We disagree. Even assuming that Brake did not claim the fees to which the arbitrators determined him entitled, we fail to see how that would resurrect Welch's interest in them. Welch has no cause to concern himself with what Brake does or does not do with his award.

determined – rightly or wrongly – that "[Lantz Welch and Lantz Welch, P.C., was] not entitled to participate in any legal fees paid[.]" Pursuant to that award, whatever rights Welch may have had in the fees were no longer his to claim. We will not look behind that award and question whether or not the arbitrators erred in their enforcement of the contract. Even were we to review the arbitration proceedings, we have already noted that we would not consider claims of legal or factual error as we would in reviewing the decision of a court of law. *See Schwartz,* 969 S.W.2d at 793-94.

We conclude that the circuit court did not commit reversible error in limiting the arbitration to Welch and Brake, in affirming the arbitration award, or in granting summary judgment. We affirm the circuit court's judgments. Davis, Bethune, and Jones' two motions to dismiss the first appeal are denied.

IN THE CIRCUIT COURT OF
JACKSON COUNTY, MISSOURI

LANTZ WELCH, et al.,	)	
	)	Case No. 01CV209224
Plaintiffs,	)	Division 8
v.	)	
	)	
GRANT DAVIS, et al.,	)	
	)	
Defendants.	)	

ORDER

Based on the filings and evidence before the Court and for good cause shown, it is hereby ORDERED as follows.

1. Timothy L. Brake's And Timothy L. Brake, P.C.'s Application To Compel Arbitration with Lantz Welch and Lantz Welch, P.C. is hereby GRANTED.

2. Lantz Welch and Lantz Welch, P.C. are hereby ORDERED to forthwith begin the process of selecting a third arbitrator with Timothy L. Brake and Timothy L. Brake, P.C. and to proceed with the arbitration process and then the arbitration as agreed to by Lantz Welch, Lantz Welch, P.C., Timothy L. Brake, and Timothy L. Brake, P.C.

3. The Motion To Dismiss of Timothy L. Brake and Timothy L. Brake, P.C. is hereby GRANTED, and Count I of the Petition against Timothy L. Brake and Timothy L. Brake, P.C. is hereby DISMISSED with prejudice.

It is SO ORDERED.

/s/ Theodore B. Scott
Theodore B. Scott
Senior Circuit Judge

August 31, 2001
Date

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI

LANTZ WELCH, AND LANTZ WELCH, P.C.	)	
	)	**CASE NO. 01CV209224**
Plaintiffs,	)	**DIVISION: SENIOR JUDGE**
v.	)	
GRANT DAVIS, SCOTT BETHUNE, THOMAS JONES, TIM BRAKE, TIM BRAKE, P.C. and DAVIS, BETHUNE & JONES, L.L.C.	)	
Defendants.	)	

ORDER

NOW, on this 28th day of December, 2001 the Court in chambers takes up Count I of plaintiffs' Petition to Compel Arbitration of the alleged dispute between plaintiff and defendants Grant Davis, Scott Bethune, Thomas Jones and Davis, Bethune and Jones, L.L.C. The Court heard oral arguments on December 7, 2001 and has considered the written suggestions of parties filed thereafter. The Court in accordance with written Conclusion of Law filed herein and made a part of this order finds the issue in favor of defendants Grant Davis, Scott Bethune, Thomas Jones and Davis, Bethune and Jones, L.L.C. and against plaintiffs Lantz Welch and Lantz Welch, P.C.

WHEREFORE, IT IS ORDERED AND DECREED that said defendants are not compelled to arbitrate the issues

raised in the petition. Any and all costs arising out of the adjudication of Count I are taxed against the plaintiffs.

/s/ Frank D. Connett, Jr.
FRANK D CONNETT, JR
SENIOR JUDGE

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI

LANTZ WELCH, AND LANTZ WELCH, P.C.	)	
	)	**CASE NO. 01CV209224**
Plaintiffs,	)	**DIVISION: SENIOR JUDGE**
v.	)	
GRANT DIVIS [sic], **SCOTT BETHUNE, THOMAS JONES, TIM BRAKE, TIM BRAKE, P.C. and DAVIS, BETHUNE & JONES, L.L.C.**	)	
Defendant.	)	

CONCLUSION OF LAW ON COUNT I

However the relationship between defendants Davis, Jones and Bethune and plaintiff Welch at any given time may be characterized they are not bound by the provision of the partnership agreement between Welch and Brake which compels arbitration of any dispute between the two partners upon dissolution of the partnership. These defendants were not signatories to this agreement nor was this partnership agreement made for their benefit. Even if they in fact benefited by being associated with the partnership the agreement was not made for their benefit nor are they seeking to enforce any benefit thereunder; they are defendants, not plaintiffs. Neither were they agents of Welch and Brake for an issue arising out of the partnership agreement. If Welch had entered into a contract, containing an arbitration clause, to represent X in a legal matter and if any of these defendants had participated in that representation they might well be required to

arbitrate any *dispute with X* concerning such representation. But, that is not the case here. The issue here involves no third parties and is between Welch and these defendants who were not party to the partnership agreement where disputes between the partners were to be arbitrated.

/s/ Frank D. Connett, Jr.
FRANK D CONNETT, JR
SENIOR JUDGE

December 28, 2001

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI AT KANSAS CITY

LANTZ WELCH, AND LANTZ WELCH, P.C.	)	
Plaintiff,	)	
v.	)	
GRANT DAVIS, SCOTT BETHUNE, THOMAS JONES, TIM BRAKE, TIM BRAKE, P.C. and DAVIS, BETHUNE & JONES, L.L.C.	)	**Case No. 01-CV-209224**
Defendants.	)	

ORDER

Now on this 14th day of February, 2002, the Court takes up the motion to alter or amend its order of December 28, 2001 filed by Lantz, Welch and Lantz Welch, P.C.

The Court recognizes that there is a unity of interest between Welch on the one hand and Brake, Davis, Bethune and Jones on the other hand and that a joint arbitration of all parties would be the best method of resolving the disputes between these parties. However, Davis, Bethune and Jones can not be required to arbitrate their claims or any claim made against them since they are not parties to the 1992 agreement between Welch and Brake or in some way bound by it. The court still can find no evidence of any fact that would compel Davis, Bethune and Jones to be bound by the results in the Welch, Brake arbitration. By the same token the Court concludes that

Welch would not be bound by the results in the Welch, Brake arbitration as to any issues between Welch and Davis, Bethune and Jones. In fact Davis, Bethune and Jones could not join the Welch, Brake arbitration without the consent of Welch and Brake. Thus the motion to alter or amend it order of December 28, 2001 is denied.

/s/ Frank D. Connett, Jr.
Frank D Connett, Jr.
Senior Judge

A copy of the foregoing **ORDER** was served by facsimile transmission on this 14th day of February 200[illegible] to:

R. Lawrence Ward, Esq.
Richard E. McLeod, Esq.
Kirk T. May, Esq.

Carol S. Buchanan, Senior/Visiting Judges Law Clerk

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI AT KANSAS CITY

LANTZ WELCH, et al., Plaintiffs, *v.* DAVIS, BETHUNE & JONES, L.L.C., et al., Defendants.	Case No.: 01CV209224 The Hon. Frank D. Connett, Jr. Division SJ

ORDER CONFIRMING ARBITRATION AWARD

COMES NOW the Court upon defendants Timothy L. Brake and Timothy L. Brake, P.C.'s Application for Confirmation of Arbitration Award. Having reviewed defendants' Application and being fully advised in the premises, defendants' Application is **SUSTAINED**. The arbitration award of April 10, 2002 attached hereto and incorporated by reference as Exhibit A is confirmed and judgment is entered in accordance with its terms in favor of defendants Brake.

Dated: July 26, 2002

/s/ Frank D. Connett, Jr.
Judge Frank D. Connett, Jr.

Copies Mailed To:

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Philip W. Bledsoe
Shughart, Thomson & Kilroy
120 West 12th Street
Kansas City, MO 64105

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1010 Walnut Street, Suite 400
Kansas City, MO 64106

Richard E. McLeod
Dean Nash
The McLeod Law Firm, P.C.
1100 Main Street, Suite 2900
Kansas City, MO 64105

Exhibit A

IN ARBITRATION BEFORE MARK KEMPTON, JOHN M. EDGAR AND MAX FOUST

TIMOTHY L. BRAKE and	)
TIMOTHY L. BRAKE, P.C.,	)
Plaintiffs,	)
	)
v.	)
	)
LANTZ WELCH and	)
LANTZ WELCH, P.C.,	)
Respondents.	)

ARBITRATION AWARD

This matter came on for arbitration before the panel of arbitrators on April 8 and 9, 2002, in Kansas City, Missouri. The arbitration was conducted on the record and based on the evidence and exhibits presented by the parties, including the following:

1. The 1992 Agreement between Lantz Welch, P.C. and Timothy L. Brake, P.C., executed on behalf of those

professional corporations and by Lantz Welch individually and Timothy L. Brake individually.

2. Claimants' Statement of Claim.

3. Respondents' Answering Statement.

Having heard the testimony of the witnesses and reviewing the exhibits provided, the award of the panel is as follows if agreed to by two or more of them:

All of the law business listed in Exhibit 102 is governed by paragraph 9 of the January 1, 1992 Agreement and Respondents are not entitled to participate in any legal fees paid in any of the matters in the referenced law business.

Agree X Disagree ___ **Mark Kempton** /s/ Mark Kempton
Agree X Disagree ___ **John M. Edgar** /s/ John M. Edgar
Agree ___ Disagree X **Max Foust** /s/ Max W. Foust

Done this 10th day of April, 2002, at Kansas City, Missouri.

A copy of the foregoing ***ORDER CONFIRMING ARBITRATION AWARD*** was mailed this 3rd day of August 2002 to:

R. Lawrence Ward, Esq.
Philip W. Bledsoe, Esq.
Richard E. McLeod, Esq.

Carol S. Buchanan, Senior/Visiting Judges Law Clerk

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI AT KANSAS CITY

LANTZ WELCH, et al., Plaintiffs, *v.* DAVIS, BETHUNE & JONES, L.C.C., et al., Defendants.	Case No.: 01 CV **209224** The Hon. **Frank D. Connett, Jr.** Division SJ

Judgment

Now on July 26th, 2002, the Court, *sua sponte*, hereby reconsiders its prior oral ruling from the bench on July 22, 2002 denying the motion for summary judgment as to Count II filed on May 21, 2002 by defendants Davis, Bethume & Jones, LLC and Grant Davis, Scott Bethune, and Thomas Jones. The Court notes that the only other claim in this matter, Count I, has been disposed of by this Court's Order of December 28, 2001. That Order is now on appeal as Case No. WD 61089. This Judgment as to Count II thereby disposes of all remaining matters in this action.

Further, the Court has contemporaneously with this Judgment denied plaintiffs' application to vacate the arbitration award and granted defendants Timothy L. Brake and Timothy L. Brake, P.C.'s application to confirm the arbitration award.

The Court has again reviewed the papers filed by the parties with respect to the motion for summary judgment and the file in this matter, as well as oral argument presented on July 22, 2002, and reconsidered its prior ruling denying the motion for summary judgment.

Being fully advised in the premises, and after holding a telephone conference with counsel on July 26, 2002 to discuss the Court's reconsideration of its prior ruling, defendants' motion for summary judgment is hereby GRANTED, and it is accordingly,

ORDERED, ADJUDGED AND DECREED that the Court hereby reconsiders its prior oral ruling denying the motion for summary judgment and judgment on Count II is entered in favor of defendants Davis, Bethune and Jones LLC, Grant Davis, Scott Bethune and Thomas Jones. Costs are assessed against plaintiffs.

/s/ Frank D. Connett Jr.
FRANK D. CONNETT JR.
Senior Judge

A copy of the foregoing **JUDGMENT** was mailed this 3rd day of August 2002 to:

R. Lawrence Ward, Esq.
Philip W. Bledsoe, Esq.
Richard E. McLeod, Esq.

Carol S. Buchanan, Senior/Visiting Judges Law Clerk

**IN THE CIRCUIT COURT OF
JACKSON COUNTY, MISSOURI
AT KANSAS CITY**

LANTZ WELCH, et al.,	)	
	)	
Plaintiffs,	)	**Case No. 01-cv-209224**
Vs	)	**Division: Senior Judge**
GRANT DAVIS, et al.,	)	
	)	
Defendants.	)	

FINDINGS OF FACTS CONCLUSIONS OF LAW

Now on this 26th day of July, 2002 the Court sua sponte reconsiders it [sic] decision in this case rendered on July 22, 2002. After considering further argument, conducted by agreement via telephone conference, and reconsidering the written briefs and arguments of counsel for plaintiff and defendants on July 22nd the Court determines that it erred on July 22, 2002 and that the decision made on that day in this case must be set aside and for naught held.

The arbitrators have determined that paragraph 9 of the 1992 Welch-Brake agreement transfers all interest in fee from the referenced cases (exhibit 102 in the arbitrators award) to Timothy Brake. The plaintiff has shown on lawful basis for not confirming the award. The arbitrator's award made in this case on April 10, 2002 will be confirmed. Thus Lantz Welch, P.C. has no legal interest in fees from these referenced cases. The fact that these fees are now in the hands of defendants Davis, Bethume and Jones is of no lawful concern of plaintiff Lantz Welch, P.C.

Therefore defendant's motion for Summary Judgment on Count II will be granted.

/s/ Frank D. Connett, Jr.
FRANK D CONNETT 7/26/02
SENIOR JUDGE

Missouri Court of Appeals
WESTERN DISTRICT

July 29, 2003

IMPORTANT NOTICE

To: All Attorneys of Record

Re: LANTZ WELCH AND LANTZ WELCH, P.C., APPELLANTS

vs.

GRANT DAVIS, SCOTT BETHUNE, THOMAS JONES, TIM BRAKE, TIM BRAKE, P.C., AND DAVIS, BETHUNE & JONES, L.L.C., RESPONDENTS
WD61089

Please be advised that Appellant's's [sic] motion for Rehearing is **OVERRULED** and motion for transfer to Supreme Court is **DENIED**. See Rule 83.04.

/s/ Terence G. Lord
Terence G. Lord
Clerk

cc: ROBERT WARD
RICHARD MCLEOD

816-374-0509
816-421-3339

In the Supreme Court of Missouri
SC85495
WD61089 consolidated with WD61731

September Session, 2003

Lantz Welch, and Lantz Welch, P.C.,

Appellants,

vs. (TRANSFER)

Grant Davis, et al.,

Respondents.

Now at this day, on consideration of the appellants' application to transfer the above-entitled cause from the Missouri Court of Appeals, Western District, it is ordered that the said application be, and the same is hereby denied.

STATE OF MISSOURI – Sct.

I, Thomas F. Simon, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the September Session, 2003, and on the 30th day of September, 2003, in the above-entitled cause.

Given under my hand and seal of said Court, at the City of Jefferson, this 30th day of September, 2003.

/s/ Thomas Simon Clerk

_____ D.C.

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI AT KANSAS CITY

LANZ WELCH, and LANTZ WELCH, P.C.,	)	
Plaintiffs,	)	**Case No. 01-CV-209224**
v.	)	
GRANT DAVIS, et al.,	)	
Defendants.	)	

PLAINTIFFS' APPLICATION FOR ORDER COMPELLING ARBITRATION AND STAYING CIRCUIT COURT ACTION

Plaintiffs, Lantz Welch and Lantz Welch, P.C., ("Welch") apply to this court for an Order under the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, and/or R.S.Mo. § 435.350, *et seq.*, compelling arbitration and staying all further proceedings in this action until arbitration has been completed in accordance with the terms of the agreement set forth below. As grounds for this application, Plaintiffs state as follows:

1. On April 20, 2001, Welch commenced this action by filing his Petition to Enforce Arbitration Or, Alternatively Declaratory Relief and Quantum Meruit.

2. On January 1, 1992, Welch and defendants Tim Brake and Tim Brake, P.C. entered into a written contract under which defendants Tim Brake and Tim Brake, P.C., agreed to associate themselves with Welch in the handling of certain legal matters.

3. The written contract between Welch and defendants Tim Brake and Tim Brake, P.C., contains the following arbitration clause:

> Upon any dissolution of this Agreement, if there is any dispute concerning the matters covered by this Contract between the parties hereto, or their heirs or legatees, the matters shall be referred to a single arbitrator, if the parties or their representatives agree upon one; otherwise, to a board of three arbitrators, of which one shall be selected by each party or his representative to the difference and a third shall be selected by those two; and the decision and award of each single arbitrator or any two of such board, as the case may be, shall be final and binding upon the parties and their respective representatives.

4. Defendants Grant Davis, Scott Bethune, and Thomas Jones, at all relevant times, acted as the agents of Tim Brake and Tim Brake P.C. (and also Welch) in connection with the written contract. By virtue of this principal-agent relationship, defendants Davis, Bethune and Jones are bound by the arbitration provision in the written contract.

5. A dispute has arisen between the parties under the terms of the written contract in that all defendants, through Brake, have improperly "withdrawn" law business (and associated legal fees) from Welch.

6. The written contract commits all issues involved in this action to arbitration.

7. Welch has presented to defendants a written demand to proceed to arbitration pursuant to the written contract but defendants refused, and continue to refuse, to

submit the entirety of this dispute over the legal fees to arbitration.

WHEREFORE, Plaintiffs Lantz Welch and Lantz Welch, P.C., request that the Court enter an Order: (1) compelling arbitration between the parties in accordance with the terms of the written contract; (2) staying all further proceedings in this action until arbitration has been completed under the terms of the written contract; and (3) awarding Plaintiffs their attorneys' fees, costs and expenses of this litigation and such other relief as the Court deems just and proper. DATED: May 9, 2001.

Respectfully submitted,

/s/ R. Lawrence Ward
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document was sent via facsimile and mailed, U.S. Mail, postage prepaid this 9th day of May, 2001 to:

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/s/ R. Lawrence Ward
Attorney for Plaintiffs

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI AT KANSAS CITY

LANZ WELCH, and LANTZ WELCH, P.C.,	)	
Plaintiffs,	)	**Case No. 01-CV-209224**
v.	)	
GRANT DAVIS, et al.,	)	
Defendants.	)	

SUGGESTIONS IN SUPPORT OF PLAINTIFFS' APPLICATION FOR ORDER COMPELLING ARBITRATION AND STAYING CIRCUIT COURT ACTION

Pursuant to a written contract, Plaintiffs Lantz Welch and Lantz Welch, P.C. ("Welch") allowed defendants Tim Brake and Tim Brake, P.C. ("Brake") to associate with Welch's law practice. That written contract contains a binding arbitration provision. Defendants Grant Davis, Scott Bethune, and Thomas Jones also associated themselves with Welch's practice and, having acted as the agents of Brake, (and the agents of Welch as well) are themselves bound to the arbitration provision. The parties are now in an unfortunate dispute over the entitlement to legal fees under the written contract. The defendants refuse to submit the dispute to arbitration. As shown below, Welch is entitled to an Order of this Court enforcing his right to have this dispute resolved in arbitration.

INTRODUCTION

For over forty (40) years, Welch maintained a very successful law practice in Kansas City, Missouri. (Petition at ¶ I.) Defendants Davis, Bethune, and Jones, as well as defendant Brake, were given the benefit of associating with Welch in the practice of law. (*Id.*) They enjoyed significant financial reward from the association. (*Id.*) In addition to consistent retention by clients and receiving referral business from other lawyers, all defendants benefitted from, among other things, Welch's financing of the operations of the law business and Welch's advancement of cash to fund contingency fee cases. (*Id.*)

To assist with his representation of clients, Welch engaged the assistance of the defendants in the practice of law. (Affidavit of Lantz Welch at ¶¶ 4, 5, attached as Exhibit A.) Davis, Bethune, and Jones performed legal work at the direction of Welch, as well as at the direction of Brake. (*Id.* at ¶ 6) This included, as they were authorized to do, signing clients to written fee contracts. (*Id.* at ¶¶ 10, 11.) And, although not separately contracting with Welch or Brake for compensation for their services, Davis, Bethune and Jones were handsomely rewarded for the work they performed at the direction of both Welch and Brake. (Petition at ¶¶ 20, 21; Affidavit of Lantz Welch at ¶¶ 7, 8.)

After demanding that Welch retire from the practice of law, the defendants have effectively ended their associations with Welch and exercised a take-over of the Lantz Welch law business. (Petition at ¶ 23; Affidavit of Lantz Welch at ¶¶ 14, 15.) Moreover, defendants have consistently denied both that Welch is entitled to legal fees arising from those cases subject to their association with

Welch and that this dispute over the fees is subject to arbitration. (Petition at ¶¶ 26, 30, 32, 33; Affidavit of Lantz Welch at ¶¶ 16, 17.)

ARGUMENT

I. Welch is Entitled to Have the Dispute Between the Parties Resolved in Arbitration

Missouri state courts have jurisdiction in matters involving both the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.*, and the Missouri Arbitration Act, R.S.Mo §§ 435.350, *et seq. Bunge Corp. v. Perryville Feed & Produce, Inc.*, 685 S.W.2d 837, 839 (Mo. banc 1985); R.S. Mo. § 435.430 Both the Federal and Missouri Acts "express the desire to enforce arbitration agreements as a matter of law to further the important public policy of resolving disputes without resort to the courts." *McCarney v. Nearing, Staats, Prelogar and Jones,* 866 S.W.2d 881, 887 (Mo. App. 1993) (citing *Village of Cairo v. Bodine Contracting Co.,* 685 S.W.2d 253, 258 (Mo.App. 1985)). "The public policy favoring arbitration is so strong that once an agreement to arbitrate is proven, the arbitration clause will be construed in favor of arbitration unless the clause positively cannot be interpreted to cover the asserted dispute." *Id.*

The Court's inquiry under both the Federal and Missouri Arbitration Acts is the same: "does a valid agreement to arbitrate exist, and if so, does the dispute fall within those terms?" *Village of Cairo v. Bodine Contracting Co.,* 685 S.W.2d 253, 260 (Mo. App. 1985). In conducting this inquiry, "the courts have no business weighing the merits of the grievance, considering whether there is equity in a particular claim, or determining whether there is particular language in the written

instrument which will support the claim." *Id.* (quoting *United Steelworkers of Am. v. Am. Mfg. Co.*, 363 U.S. 564, 568 (1960)). Thus, if the court concludes that the dispute is committed to arbitration by an agreement, the court must send the case to arbitration without reaching the merits of the underlying grievance. *Local 781 Int'l Ass'n of Firefighters v. City of Independence,* 996 S.W.2d 112, 115 (Mo.App. 1999).

A. A valid agreement to arbitrate exists and all defendants are bound by that agreement

As to this Court's first inquiry, it is abundantly clear that a valid agreement to arbitrate exists. The written agreement signed by both Welch and Brake explicitly states that any dispute concerning the matters covered by the contract is subject to arbitration. The arbitration provision is contained in paragraph 14 of the written contract and states as follows:

> Upon any dissolution of this Agreement, if there is any dispute concerning the matters covered by this Contract between the parties hereto, or their heirs or legatees, the matters shall be referred to a single arbitrator, if the parties or their representatives agree upon one; otherwise, to a board of three arbitrators, of which one shall be selected by each party or his representative to the difference and a third shall be selected by those two; and the decision and award of each single arbitrator or any two of such board, as the case may be, shall be final and binding upon the parties and their respective representatives.

By signing the Agreement, defendant Brake explicitly agreed to submit disputes under the Agreement to arbitration. In addition, defendants Davis, Bethune, and Jones, through their actions and their relationships with Welch and Brake, have bound themselves to the Agreement's arbitration provision.

Under Missouri law, non-signatory agents are bound by arbitration agreements signed by their principals. *Byrd v. Sprint Communications Co.,* 931 S.W.2d 810, 815 (Mo.App. 1996)[1]; *see also Tractor-Trailer Supply Co. v. NCR Corp.,* 873 S. W.2d 627, 630 (Mo. App. 1994). And, the arrangement under which Brake and Davis, Bethune, and Jones handled legal matters establishes an agency relationship between them. Agency is a fiduciary relationship which required the existence of three elements:

> (1) the agent 'holds a power to alter legal relation[s] between the principal and third persons and between the principal and himself'; (2) the agent 'is a fiduciary with respect to matters within the scope of his agency'; and (3) the principal has the right to control the conduct of the agent with respect to matters entrusted to him.'

---

[1] Although the court in *Byrd* ultimately did not bind the non-signatory in that case to the arbitration provision, this was based solely on the court's additional holding that the non-signatory party was not in an agency relationship with the signatory party. *Byrd,* 931 S.W.2d at 815. However, this latter finding by the court does not to [sic] detract from the court's establishment of the proposition of law that a non-signatory agent is bound by an arbitration agreement signed by his or her principal. As shown below, because the facts of this case establish an agency relationship between Davis, Bethune, and Jones and Brake (and also Welch for that matter), this case clearly falls within the rule of law set forth in *Byrd* that a non-signatory agent is indeed bound.

Capitol Indem. Corp. v. Citizens Nat'l Bank of Fort Scott, 8 S.W.3d 893, 903 (Mo. App. 2000) (quoting *State ex rel. Bunting v. Koehr,* 865 S.W.2d 351, 353 (Mo. banc 1993).

The relationship between Brake and Davis, Bethune, and Jones establishes all three of these elements. As to the first element, Davis, Bethune, and Jones were authorized and/or held the power to sign clients to written fee contracts to which they were not parties. (Affidavit of Lantz Welch at ¶¶ 10-12.) Thus, Davis, Bethune and Jones held the power to effectively alter the legal relationship between Welch, Brake and third parties such as new clients. Additionally, by handling Brake's legal matters, Davis, Bethune, and Jones concomitantly held a power to alter the legal relationship between themselves and their principal.

The second and third elements of agency are also met. Davis, Bethune, and Jones owed a fiduciary duty to Brake (and Welch) to effectively handle legal matters entrusted to them. Moreover, this fiduciary duty would have prevented the three from interfering with the contractual relationship between their principal and the client. And it cannot seriously be disputed that to the extent Brake entrusted legal matters – which he was contractually bound to provide either to Welch and/or clients he independently contracted with – to Davis, Bethune, and Jones, it necessarily holds true that Brake held the right to control their conduct in handling those matters. Indeed, Brake used funds he obtained from his association with Welch to compensate Davis, Bethune, and Jones for the legal work entrusted to them. (Affidavit of Lantz Welch at ¶ 9.) It is logical then that in light of his contractual obligation to provide effective legal representation, and the payments to Davis, Bethune, and Jones, that Brake would

have the ability to control the method and manner in which the delegated legal work was performed.

Finally, as a practical matter, it makes logical sense to hold Brake and Davis, Bethune, and Jones to the agency relationship they operated under. Davis, Bethune, and Jones, were not, during the existence of Agreement between Welch and Brake, separately hired by clients. (Affidavit of Lantz Welch at ¶ 12.) Instead, David, Bethune, and Jones would, at most, enter Welch into contractual relationships with clients and then perform portions of the legal work as directed by Welch and Brake (*Id.* at ¶¶ 10-12.) Thus, Brake – and indeed Welch – expected as principals, that their agents Davis, Bethune, and Jones would faithfully handle the important legal matters they were directed to perform.

B. The present dispute between the parties is plainly within the terms of the written Agreement

In order to compel arbitration, this Court must also find that the dispute between the parties is within the terms of the Agreement containing the arbitration provision. *See Village of Cairo,* 685 S.W.2d at 260. This requirement is easily met under the facts of this case. As set forth in Welch's Petition, the dispute between the parties is over the entitlement to legal fees. *(See, e.g.,* Petition at ¶¶ 26, 30.) The subject matter of the Agreement between Welch and Brake is identical to that involved in the dispute. The Agreement was designed to provide for the orderly allocation of those legal fees if the parties could not resolve the matter themselves. (*See, e.g.,* Agreement at ¶¶ 6, 8, 9, 10.) But because defendants are withholding

fees that rightfully belong to Welch, this dispute has arisen and the Agreement is thereby implicated.

Because a valid arbitration agreement – binding on all defendants – exists, and the dispute between the parties is within that agreement, both the Federal Arbitration Act and the Missouri Arbitration Act require that this Court order the defendants to submit the dispute to arbitration. Local 781, 996 S.W.2d at 115; 9 U.S.C. § 4; R.S.Mo. § 435.355. Further, because the dispute is subject to arbitration, this Court must stay this action upon compelling the parties to submit to arbitration. *State ex rel. PaineWebber, Inc. v. Voorhees,* 891 S.W.2d 126, 128 (Mo. banc 1995); *Mueller v. Hopkins & Howard, P.C.,* 5 S.W.3d 182,186 (Mo.App. 1999); 9 U.S.C. § 3; R.S.Mo. § 435.355.

CONCLUSION

For the foregoing reasons, Welch respectfully requests that the Court enter an Order compelling arbitration between the parties, staying all further proceedings in this action until arbitration has been completed, and awarding Plaintiffs their attorneys' fees, costs and expenses of this litigation and such other relief as the Court deems just and proper.

DATED: May 9, 2001

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document was sent via facsimile and mailed, U.S. Mail, postage prepaid this 9th day of May, 2001 to:

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/s/ R. Lawrence Ward
Attorney for Plaintiffs

EXHIBIT "A"

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI AT KANSAS CITY

LANZ WELCH, and LANTZ WELCH, P.C.,	)	
Plaintiffs,	)	**Case No. 01-CV-209224**
v.	)	
GRANT DAVIS, et al.,	)	
Defendants.	)	

AFFIDAVIT OF LANTZ WELCH

I, Lantz Welch, being of lawful age and having first been duly sworn upon my oath, state as follows:

1. I am one of the Plaintiffs in the above-captioned matter, and have personal knowledge of the facts set forth in this Affidavit.

2. Pursuant to a written contract dated January 1, 1992, defendants Timothy L. Brake and Timothy L. Brake P.C., ("Brake") became associated with Lantz Welch, P.C. and me in the practice of law.

3. The written contract (referenced in paragraph 2 above) contains an arbitration provision that makes disputes arising from the written contract subject to mandatory arbitration.

4. I entered the written contract with Brake in order to engage his assistance in the representation of my clients.

5. I also engaged the assistance of defendants Grant Davis, Scott Bethune, and Thomas Jones to assist with the representation of my clients.

6. During the existence of the written contract between Brake and myself, Davis, Bethune, and Jones performed legal work at my direction, as well as at the direction of Brake.

7. To my knowledge, Davis, Bethune and Jones did not separately enter a written agreement with either Brake or myself for compensation for their services.

8. Although not separately contracting for compensation for their services, Davis, Bethune, and Jones received payment for the legal work they performed for Brake and me.

9. Brake used funds he obtained from his association with me to compensate Davis, Bethune, and Jones for the legal work entrusted to them.

10. In performing the legal work entrusted to them, Davis, Bethune, and Jones were authorized and/or held the power to sign clients to written fee contracts to which they were not parties.

11. The legal work performed by Davis, Bethune, and Jones included interviewing potential clients and, as they were authorized to do, signing on behalf of Lantz Welch, P.C. new clients to written fee contracts for me.

12. Davis, Bethune, and Jones were not separately hired by my clients. Instead, the clients hired Lantz Welch, P.C., and Davis, Bethune, and Jones then perform [sic] portions of the legal work as directed.

13. The overwhelming majority of clients who retained Lantz Welch, P.C., and signed written fee contracts with Lantz Welch, P.C., did so based on their knowledge of my legal background and not based on the reputations of Davis, Bethune, and Jones.

14. After demanding that I retire from the practice of law, the defendants have effectively ended their association with Lantz Welch, P.C., and me.

15. The defendants have effectively exercised a takeover of my law business.

16. The defendants have consistently denied that I am entitled to legal fees arising from those cases subject to the defendants' association with me and my law practice.

17. The defendants have also consistently denied that the entirety of this dispute over the legal fees is subject to arbitration.

FURTHER AFFIANT STATES NAUGHT.

/s/ Lantz Welch
Lantz Welch

STATE OF MISSOURI)
) ss
COUNTY OF JACKSON)

Subscribed and sworn to before me this 8th day of May, 2001.

/s/ Brenda L. Lee
Notary Public

My Commission Expires:

"NOTARY SEAL"
Brenda L. Lee, Notary Public
Clay County, State of Missouri
My Commission Expires 9/25/2002

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

LANTZ WELCH, et al.,	)	**Case No. WD 61089**
Appellants,	)	**(Consolidated Case**
	)	**No. WD 61731)**
v.	)	
GRANT DAVIS, et al.,	)	
	)	
Respondents.	)	

APPELLANTS LANTZ WELCH AND LANTZ WELCH, P.C.'S MOTION FOR REHEARING AND REHEARING EN BANC AND SUGGESTIONS IN SUPPORT

(Filed Jun. 25, 2003)

Appellants Lantz Welch and Lantz Welch, P.C. (collectively, "Welch"), pursuant to Rule 84.17 of the Missouri Rules of Civil Procedure, respectfully move the Court to set aside its opinion issued June 10, 2003 and grant a rehearing and rehearing en banc, and as grounds for this motion, state:

1. The Court overlooked the fact that the harmless error doctrine cannot be applied to deprive Welch of his federally-granted statutory right under the Federal Arbitration Act to arbitrate (or his state-granted right under the Missouri Arbitration Act) both because that doctrine simply does not apply to the denial of such a statutory right and because federal law preempts conflicting state substantive and procedural law.

2. The Court overlooked or misinterpreted existing law in choosing not to follow previous decisions of the Missouri Court of Appeals for the Western District in *Byrd*

v. Sprint Communications Co., L.P., 931 S.W.2d 810 (Mo. App. 1996) and the Missouri Court of Appeals for the Eastern District in *Tractor-Trailer Supply Co. v. NCR Corp.,* 873 S.W.2d 627 (Mo. App. 1994). This Court held that it "painted with too broad a brush in *Byrd.*" *See* Slip op. at 4 n.1. But under Supreme Court Operating Rule 22.01, and this Court's Local Rule XXXI, the Court's per curiam opinion must be reviewed by the Court en banc. In the alternative, this Court should simply act to correct its legal error in disregarding governing Missouri precedent.

3. The Court overlooked or misinterpreted, or incorrectly disregarded, the substantial evidence in the record of the agency relationship between Timothy L. Brake, P.C., Timothy L. Brake (collectively, "Brake") and Grant Davis, Scott Bethune and Thomas Jones. *See* Slip op. at 4 & 4 n.1.

4. The Court overlooked or misinterpreted Missouri precedent on the real-party-in-interest rule. *See* Slip op. at 8-10. Because Welch never assigned his right to participate in the attorneys' fees from the *Alcorn v. Union Pacific Railroad Co.* case, the real-party-in-interest rule has no application. In addition, the Court overlooked the fact that Brake never had a contractual relationship with the client in *Alcorn* (or any other case at issue), which makes the arbitration award in favor of Brake meaningless to the extent it would support application of the real-party-in-interest rule to this case.

SUGGESTIONS IN SUPPORT

Under the Court's per curiam opinion, four lawyers who spent the majority of their legal careers working as salaried employees of a long-established law firm – over

thirty years old – can hold a secret meeting and hatch a plot to take over that firm with absolute impunity. Those lawyers can successfully arrogate to themselves the firm's clients and all its existing business, including all fees based on work already done subject to existing contractual relationships between the firm and its clients. Lantz Welch primarily produced the cases these lawyers took, and Lantz Welch paid all overhead expenses and advances on them. (L.F. 1-8, 11-13). Welch, not Brake, Davis, Bethune or Jones, provided the financing for the cases and assumed the entirety of the risk of their contingent-fee nature. (*Id.*) Not only did Welch finance the firm's operation, but he provided invaluable legal training for Davis, Bethune and Jones, the three young and inexperienced lawyers who worked on Lantz Welch, P.C. cases without any personal risk and for a guaranteed income. (*Id.*)

Contrary to the impression given by the Court's opinion, *see* slip op. at 2, this dispute is not centered on the *Alcorn* case, which spent almost its entire existence as a Lantz Welch, P.C. case and produced $12 million in attorneys' fees the Court now awards to respondents. The *Alcorn* case is only the tip of the iceberg; this dispute instead involves not just *Alcorn,* but 52 similarly-situated cases that will allow Brake, Davis, Bethune and Jones to appropriate millions upon millions of dollars in attorneys' fees without the slightest recognition to Welch. (Third S.L.F. (Case No. WD 61089) 199-203).

Not only does the Court's opinion allow this result, but it does so based on the legal and factual fiction that Timothy L. Brake somehow "withdrew" these cases. In reality, Davis, Bethune and Jones effectively "withdrew" the cases, and are using Brake and Brake's contract with Welch to do so without accounting for a cent. This dispute,

then, is really between Welch, on the one hand, and Davis, Bethune and Jones on the other. Unfortunately, that is the one dispute that will never be squarely faced if the Court's opinion is allowed to stand. An arbitration solely with Brake alone effectively solves nothing, because Brake never held a right to the attorneys' fees at issue. Welch might as well arbitrate with a phantom.

The Court overlooked or misinterpreted both the law and facts in Welch's first appeal, which challenged the trial court's failure to compel Davis, Bethune and Jones to arbitrate along with Welch and Brake. The Court overlooked the fact that the harmless error doctrine does not apply, and in any event cannot defeat a statutory right to arbitration. The Court also disregarded existing precedent that governed the issue – *Byrd v. Sprint Communications Co.*, 931 S.W.2d 810 (Mo. App. 1996) and *Tractor-Trailer Supply Co. v. NCR Corp.*, 873 S.W.2d 627 (Mo. App. 1994) – and disregarded or overlooked the evidence in the record establishing that Davis, Bethune and Jones were either Brake's agents or third-party beneficiaries of the contract between Welch and Brake. In Welch's second appeal, the Court misinterpreted the real-party-in-interest rule when it concluded that Welch was not a real party in interest to his *quantum meruit* action against Davis, Bethune and Jones. The Court should, therefore, set aside its opinion and rehear this matter.

I. The Court Overlooked the Fact that the Harmless Error Doctrine Has No Application in the Circumstances of this Case and, In Any Event, Cannot Be Used to Defeat Welch's Right to Arbitration Granted by Congress in the Federal Arbitration Act.

The Court found that, even assuming Welch was correct that he was entitled to arbitrate the dispute with not just Brake, but Davis, Bethune and Jones as well, it would not reverse because it could discern no prejudice to Welch. *See* Slip op. at 4. The Court stated that "[e]ven assuming that excluding Davis, Bethune and Jones from the arbitration was error, it was harmless." *Id.* at 5. The Court, however, erred in applying the harmless error doctrine to defeat Welch's federally-granted statutory right under the Federal Arbitration Act to arbitrate this dispute (and state-granted right under the Missouri Arbitration Act, for that matter), not just with the signatory to the arbitration agreement, but also with that signatory's agents.

Initially, Welch notes that the Court erred in finding that he suffered no prejudice as a result of Davis, Bethune and Jones not being compelled to arbitrate. *See* Slip op. at 4. Welch was prejudiced for several reasons. First, without Davis, Bethune and Jones as parties to the arbitration, Welch had no motive to fully explore how Brake never contracted with the clients at issue and, therefore, could not have withdrawn the cases. Davis, Bethune and Jones, rather than Brake, withdrew the cases and, as parties, Welch could have correctly shifted the focus of the arbitration to the dispute between Welch and Davis, Bethune and Jones. Welch, however, was prevented from fully showing

to the arbitration panel that Davis, Bethune and Jones, not Brake, withdrew the cases from Lantz Welch, P.C.

Second, Davis, Bethune and Jones appeared in the arbitration as witnesses for Brake, not as parties in their own right. They, therefore, had different motives when testifying at the arbitration proceeding. They could provide testimony favorable to Brake without fully risking their own interests given their non-party status. Third, Welch's counsel obviously had different motives in cross-examining Davis, Bethune and Jones since they were appearing merely as witnesses. Had they been appearing as parties, the cross-examinations, and all other aspects of Welch's arbitration strategy, could have been much more searching because they would have involved actual parties to the arbitration.

Even assuming, however, that excluding Davis, Bethune and Jones from the arbitration was harmless error, the court still could not apply that doctrine to defeat Welch's statutory right, whether under the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.*, or the Missouri Arbitration Act ("MAA"), R.S.Mo. § 435.350, *et seq.*, to arbitrate the dispute with the signatory to the arbitration agreement *and* the signatory's agents.[1] The harmless error doctrine has no application in such a situation. That doctrine, instead, applies to appellate review of the admissibility and reception of evidence and other trial-related

[1] Under both federal and Missouri law, non-signatory agents are bound by arbitration agreements signed by their principals. *See Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 7 F.3d 1110, 1122 (3d Cir. 1993); *Byrd*, 931 S.W.2d at 815; *Tractor-Trailer*, 873 S.W.2d at 630.

issues. *See State v. Anglin*, 45 S.W.3d 470, 472 (Mo. App. 2001) ("[f]urthermore, in matters involving the *admission of evidence,* we review for prejudice, not mere error and will reverse only if the error was so prejudicial that it deprived the defendant of a fair trial." (emphasis added) (quoting *State v. Harrison,* 24 S.W.3d 215,218 (Mo. App. 2000)); *see also* 24 Daniel P. Card II & Alan E. Freed, *Missouri Practice – Appellate Practice* § 3.10 (2d ed. 2001); *State v. Wilson,* 816 S.W.2d 301, 303-04 (Mo. App. 1991) (recognizing that the infringement of certain rights "can never be treated as harmless error"). The case relied on by the Court to support its harmless error reasoning, *Neavill v. Klemp*, 427 S.W.2d 446, 448 (Mo. 1968), in fact involves an issue regarding the admission of evidence at trial and applies the harmless error doctrine in that context. *See id.* at 448. The court was unable to cite a single case that would support the application of the harmless error doctrine to defeat a statutorily-granted right, like the right to a full and fair arbitration granted to Welch under the FAA and the MAA.

Moreover, even if the harmless error doctrine could be said to apply in the circumstances of this case, it could in no event defeat Welch's federally-granted, statutory right to arbitrate this dispute with signatory Brake and his non-signatory agents Davis, Bethune and Jones.[2] Missouri courts, including the Missouri Supreme Court, have repeatedly made clear that: (1) they are prohibited from

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[2] The Court did not address the issue of whether the FAA or the MAA applies in this case. Welch, however, demonstrated in his briefing that between the two, the FAA is applicable. (*See* Appellant's Reply Br. (Case No. WD 61731) at 13-14).

applying substantive or procedural state law that is in derogation of federal law; and (2) the FAA preempts inconsistent state law. *See Bunge Corp. v. Perryville Feed & Produce, Inc.*, 685 S.W.2d 837, 839-40 (Mo. 1985) ("The court under the supremacy clause is obligated to apply federal law, and may not apply state law, substantive or procedural, which is in derogation of federal law.") (citation omitted); *Strain-Japan R-16 Sch. Dist. v. Landmark Sys., Inc.*, 51 S.W.3d 916, 920 (Mo. App. 2001); *Group Health Plan, Inc. v. B.J.C. Health Sys., Inc.*, 30 S.W.3d 198, 202 n.2 (Mo. App. 2000); *Duggan v. Zip Mail Servs., Inc.*, 920 S.W.2d 200, 203 (Mo. App. 1996); *Mr. Mudd, Inc. v. Petra Tech, Inc.*, 892 S.W.2d 389, 391-92 (Mo. App. 1995); *Brookfield R-III Sch. Dist. v. Tognascioli Gross Jarvis Kautz Architects, Inc.*, 845 S.W.2d 103, 105 (Mo. App. 1993); *Boogher v. Stifel, Nicolaus & Co., Inc.*, 825 S.W.2d 27, 29 (Mo. App. 1992). Applying a harmless-error analysis to defeat Welch's federal right to arbitration was a direct violation of this principle. The Court was required to give effect to Welch's federal right to arbitration even if a denial of that right could possibly be said to be harmless in the circumstances of this case.

II. The Court's Per Curiam Opinion Disregarded Existing Precedent and Must Be Reheard En Banc.

In its per curiam opinion, the Court candidly acknowledged that it was refusing to follow the previous decision of the Missouri Court of Appeals for the Western District in the *Byrd* case. The Court stated that it "painted with too broad a brush in *Byrd*." Slip op. at 4 n.1. The Court then assumed that Davis, Bethune and Jones were agents of Brake, but found there was "nothing about that

status that would compel them to submit to arbitration." *Id.*

In Byrd, this Court expressly adopted the "rule [that] non-signatory agents [are] bound by arbitration agreements signed by their principals." *Id.* at 815. In addition, the Missouri Court of Appeals for the Eastern District has previously held that a non-signatory agent is bound by an arbitration agreement signed by his or her principal. *Tractor-Trailer Supply Co. v. NCR Corp.*, 873 S.W.2d 627, 630 (Mo. App. 1994). The Court's per curiam opinion, however, disregards both of these holdings.

This Court's Local Rule XXXI, enacted to comply with Supreme Court Operating Rule 22.01, states that "[a]ny division opinion that chooses not to follow a previous decision of a Missouri appellate court shall be reviewed en banc." Local Rule XXXI. Under this local rule, and the Supreme Court Operating Rule on which it is based, Welch is entitled to a rehearing en banc. The holdings in *Byrd* and *Tractor-Trailer* were dispositive of the issue presented by Welch's first appeal. If the record established that Davis, Bethune and Jones were Brake's agents (which it does), the Court could only follow Missouri precedent by compelling Davis, Bethune and Jones to arbitrate with Welch and Brake. Even aside from a rehearing en banc, therefore, the Court should act to set aside its opinion to correct this error.

The Court's per curiam opinion should be reheard and set aside not only because it disregards existing precedent, but also because the law it creates is unworkable. Instead of following *Byrd,* the Court held that proper principles of contract and agency law "will, under the proper circumstances, permit a party to an arbitration agreement to

compel an agent of the other party to arbitrate a dispute although the agent did not enter into the agreement." Slip op. at 4 n.1. Under the Court's holding, parties will be left to guess whether a nonsignatory agent will be bound to an arbitration agreement signed by their principal. The new rule fashioned by the Court simply applies "under the proper circumstances." Slip op. at 4 n.1.

In addition, the Court's opinion not only fails to follow existing precedent, it also purports to overrule it. In place of the well-established and easily-applied rule created in both *Byrd* and *Tractor-Trailer,* the Court substitutes a test that has no real meaning for litigants. Welch is entitled to the benefit of the rule established in *Byrd* and *Tractor-Trailer,* and future cases should likewise be guided by that rule. Welch is entitled to a rehearing en banc to correct the per curiam opinion's failure to follow existing precedent in its misguided effort to craft new law in Missouri.

III. The Court Overlooked, Misinterpreted or Disregarded the Record Evidence that Established, as a Matter of Law, that Davis, Bethune and Jones were Brake's Agents.

Rather than directly address whether Davis, Bethune and Jones were Brake's agents, the Court simply brushed this critical issue aside by holding that it discerned no prejudice to Welch even if Welch was correct and Davis, Bethune and Jones should have been required to arbitrate. Slip op. at 4. The Court did give the issue slight attention by stating that "the record does not establish clearly that [Davis, Bethune and Jones were Brake's agents]." Slip op. at 4 n.1. The record, however, contained evidence establishing as a matter of law that Davis, Bethune and Jones

were Brake's agents. Aside from this record evidence, the Court's *own opinion* establishes that agency relationship.

In failing to find that Davis, Bethune and Jones were Brake's agents, the Court overlooked or disregarded several pieces of critical record evidence. First, the Court overlooked or disregarded the various ways in which Davis, Bethune and Jones held the power to alter the legal relationship between Brake and third parties. *See* Appellant's Br. (Case No. WD 61089) at 17-18. The Court also ignored the other realities of the relationship between Brake and Davis, Bethune and Jones such as the fiduciary duty Davis, Bethune and Jones owed to Brake to effectively handle legal matters entrusted to them and Brake's right to control their conduct in handling those matters. *See* Appellant's Br. (Case No. WD 61089) at 19.

Even if Welch's own evidence did not establish an agency relationship between Brake and Davis, Bethune and Jones, the Court's own opinion does. In the course of its opinion, the Court found that Welch and Brake practiced together in a firm. *See* Slip op. at 6. The Court reasoned that Brake and Welch "held themselves out to their clients and practiced together as a single, collective business entity." *Id.* The Court also cited the definition of a "firm" in Black's Law Dictionary: "Business entity or enterprise." *Id.* (quoting Black's Law Dictionary 634 (6th ed. 1990)).

Under this reasoning, Davis, Bethune and Jones were also a part of that same firm. They, like Brake, associated themselves with Welch in the practice of law at the Law Offices of Lantz Welch, P.C. They also, along with Welch and Brake, held themselves out to their clients and practiced together as a single, collective business entity.

A key portion of the definition of "firm" in Black's Law Dictionary that the Court failed to recognize is that a firm is also defined as a "[p]artnership of two or more persons." Black's Law Dictionary 634 (6th ed. 1990). Under Missouri law, the partners in this partnership were all *agents* of each other. *Schnucks Markets, Inc. v. Cassilly,* 724 S.W.2d 664, 666 (Mo. App. 1987); *Baker v. McCue-Moyle Dev. Co.,* 695 S.W.2d 906, 911 (Mo. App. 1984). The Court's own opinion, therefore, establishes that the Court overlooked or disregarded the fact that Davis, Bethune and Jones were Brake's agents.

Because the Court overlooked or disregarded crucial evidence on the agency issue, and the opinion itself establishes that Davis, Bethune and Jones were Brake's agents, the opinion must be set aside. Welch's Motion for Rehearing should be granted on this basis as well.

IV. The Court Overlooked or Misinterpreted the Real-Party-in-Interest Rule Under Missouri Law in Finding that Welch was not the Real Party in Interest to His *Quantum Meruit* Claim Against Davis, Bethune and Jones.

In Welch's second appeal, the Court found that the trial court correctly granted summary judgment in favor of Davis, Bethune and Jones on Welch's *quantum meruit* claim because Welch was not a real party in interest to that claim. Slip op. at 9-11. To reach this holding, however, the Court had to overlook or misinterpret the real-party-in-interest rule in Missouri.

Under Missouri law "[b]are legal title to a claim is sufficient to constitute a real party in interest who can bring an action thereon." *J.E. Dunn, Jr. & Assocs., Inc. v.*

Total Frame Contractors, Inc., 787 S.W.2d 892, 896 (Mo. App. 1990). Welch met this test on his *quantum meruit* claim against Davis, Bethune and Jones. In finding otherwise, the Court overlooked the fact that the arbitration between Brake and Welch *did not* involve the *quantum meruit* claim or any issue between Welch and Davis, Bethune and Jones. Both legally and factually, therefore, the arbitration award in favor of Brake could not operate to divest Welch of his *quantum meruit* claim against Davis, Bethune and Jones.

The Court also overlooked the fact that Welch never assigned or waived his right to assert a *quantum meruit* claim against Davis, Bethune and Jones. Without such a finding, the real-party-in-interest rule had no application in the circumstances of this case. *See J.E. Dunn,* 787 S.W.2d at 896; *Janssen v. Guaranty Land Title Co.*, 571 S.W.2d 702, 706 (Mo. App. 1978). Although the arbitration award might establish that Welch assigned the right to assert a claim against Brake for the attorneys' fees at issue, that award simply does not touch on a claim against Davis, Bethune and Jones for those fees.

In addition, to the extent Court's real-party-in-interest ruling relies on a finding that Brake possessed any rights that Welch may have had to the attorneys' fees at issue, *see* Slip op. at 9, the opinion overlooks a fundamental fact. Brake never had a contract with the client at issue, Kimberly Alcorn, or any other client. It is, therefore, legally and factually impossible for Brake to possess the right to attorneys' fees from the *Alcorn* case when he has never had a contractual right to those fees. As Welch pointed out repeatedly in his briefing to the Court, in an argument that the Court must have overlooked to reach the opinion it did, Welch and Davis, Bethune and Jones are the only parties to this dispute who have had a

contractual right to the attorneys' fees at issue. *See* Appellant's Br. (Case No. WD 61089) at 28-29 n.12; Appellant's Br. (Case No. WD 61731) at 13-18; Appellant's Reply Br. (Case No. WD 61731) at 4-8. To say that *Brake* somehow extinguished *Welch's* right to the attorneys' fees at issue – the arbitration award notwithstanding – overlooks the factual realities of this case.

Welch's Motion for Rehearing should be granted for this separate reason as well. Even if Welch's Motion for Rehearing and Rehearing En Banc on the arbitration issue presented in the first appeal is denied, Welch is nevertheless entitled to a rehearing on the Court's decision to affirm the trial court's entry of summary judgment in favor of Davis, Bethune and Jones on Welch's *quantum meruit* claim.

CONCLUSION

Welch's Motion for Rehearing and Rehearing En Banc should be granted.

Respectfully submitted,

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I hereby certify that a true and correct copy of the above and foregoing document was sent U.S. mail, postage prepaid, this 25th day of June, 2003 to:

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IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

LANTZ WELCH, et al.,	)	
	)	
Appellants,	)	**Case No. WD 61089**
v.	)	**(Consolidated Case**
	)	**No. WD 61731)**
GRANT DAVIS, et al.,	)	
	)	
Respondents.	)	

APPELLANTS LANTZ WELCH AND LANTZ WELCH, P.C.'S ALTERNATIVE APPLICATION FOR TRANSFER

(Filed Jun. 25, 2003)

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Appellants Lantz Welch and Lantz Welch, P.C. (collectively, "Welch"), in the event Welch's Motion for Rehearing and Rehearing En Banc is denied, move the Court to order the transfer of this case to the Missouri Supreme Court because of the general interest and importance of the following questions:

1. Can a state appellate court disregard a parties' federally-granted, statutory right to arbitrate a dispute found in the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* (or even the state-granted right in the Missouri Arbitration Act, R.S.Mo. § 435.350 *et seq.*), by simply claiming that the denial of that right is "harmless error" under state law, especially since it is well-established in Missouri case law that state courts cannot apply substantive or procedural state law that is in derogation of federal arbitration law?

2. Under Missouri law, are non-signatory agents bound to arbitration agreements signed by their principals, as the Court of Appeals for both the Eastern and Western Districts have held in *Tractor-Trailer Supply Co. v. NCR Corp.*, 873 S.W.2d 627, 630 (Mo. App. E.D. 1994) and *Byrd v. Sprint Communications Co., L.P.*, 931 S.W.2d 810, 815 (Mo. App. 1996), or are non-signatory agents bound only "under the proper circumstances[,]" as the court of appeals held in this case as it purported to limit the holdings in both *Tractor-Trailer* and *Byrd*?

3. Can only a lawyer who actually enters a contract for representation with a client be entitled to attorneys' fees for that representation, or can any lawyer claim that he or she has withdrawn the case and thereby gained all rights to attorneys' fees, including those fees attributable to work done before the withdrawal?

STATEMENT OF FACTS

Welch appealed the trial court's order denying his application to compel Respondents Grant Davis, Scott Bethune, Thomas Jones, and the law firm of Davis, Bethune & Jones, L.L.C. – along with Respondents Timothy

L. Brake and Timothy L. Brake, P.C. (collectively "Brake") – to arbitrate this dispute over attorneys' fees. The trial court subsequently confirmed an arbitration award in favor of Brake in an arbitration he compelled between just him and Welch. The trial court also entered summary judgment on Welch's remaining *quantum meruit* claim against Davis, Bethune and Jones. Welch then appealed from the latter two decisions. On appeal, this Court affirmed the trial court's judgments. The Court found that any error in failing to compel Davis, Bethune and Jones to arbitrate was harmless. The Court also upheld the arbitration award in favor of Brake and the entry of summary judgment in favor of Davis, Bethune and Jones.

SUGGESTIONS IN SUPPORT

Under the Court's per curiam opinion, four lawyers who spent the majority of their legal careers working as salaried employees of a long-established law firm can hold a secret meeting and hatch a plot to take over that firm with absolute impunity. Those lawyers can successfully arrogate to themselves the firm's clients and all its existing business, including all fees based on work already done under existing contingent fee relationships between the firm and its clients. Lantz Welch primarily produced the cases these lawyers took, and Lantz Welch paid all overhead expenses and advances on these cases. (L.F. 1-8, 11-13). Welch, not Brake, Davis, Bethune or Jones, provided the financing for the cases and assumed the entirety of the risk of their contingent-fee nature. (*Id.*) Not only did Welch finance the firm's operation, but he provided invaluable legal training for Davis, Bethune and Jones, the three young and inexperienced lawyers who worked on

Lantz Welch, P.C. cases without any personal risk and for a guaranteed income. (*Id.*)

Contrary to the impression given by the Court's opinion, *see* slip op. at 2, this dispute is not centered on the *Alcorn* case, which spent almost its entire existence as a Lantz Welch, P.C. case and produced $12 million in attorneys' fees the Court now awards to respondents. The *Alcorn* case is only the tip of the iceberg; this dispute instead involves not just *Alcorn,* but 52 similarly-situated cases that will allow Brake, Davis, Bethune and Jones to appropriate millions upon millions of dollars in attorneys' fees without the slightest recognition to Welch. (Third S.L.F. (Case No. WD 61089) 199-203).

Not only does the Court's opinion allow this result, but it does so based on the legal and factual fiction that Timothy L. Brake somehow "withdrew" these cases. In reality, Davis, Bethune and Jones effectively "withdrew" the cases, and are using Brake and Brake's contract with Welch to do so without accounting for a cent. This dispute, then, is really between Welch, or the one hand, and Davis, Bethune and Jones on the other. Unfortunately, that is the one dispute that will never be squarely faced if the Court's opinion is allowed to stand. An arbitration solely with Brake alone effectively solves nothing, because Brake never held a right to the attorneys' fees at issue. Welch might as well arbitrate with a phantom.

I. Infringement of Federally-Granted, Statutory Right to Arbitrate Dispute and Preemption of Conflicting State Substantive and Procedural Law.

The Court found that, even assuming Welch was correct that he was entitled to arbitrate the dispute not just with Brake, but with Davis, Bethune and Jones as well, it would not reverse because it could discern no prejudice to Welch. *See* Slip op. at 4. The Court stated that "[e]ven assuming that excluding Davis, Bethune and Jones from the arbitration was error, it was harmless." *Id.* at 5. The Court, however, erred in applying the harmless error doctrine to defeat Welch's federally-granted statutory right under the Federal Arbitration Act (and state-granted right under the Missouri Arbitration Act, for that matter) to arbitrate this dispute not just with the signatory to the arbitration agreement, but also with that signatory's agents.

As an initial matter, the Court erred in finding that Welch suffered no prejudice as a result of Davis, Bethune and Jones not being compelled to arbitrate. *See* Slip op. at 4. Welch was prejudiced for several reasons. First, without Davis, Bethune and Jones as parties to the arbitration, Welch was prevented from fully explaining to the arbitration panel that it was Davis, Bethune and Jones, not Brake, who had withdrawn the cases from Lantz Welch, P.C. Second, Davis, Bethune and Jones appeared in the arbitration as witnesses for Brake, not as parties in their own right. They thus had different motives when testifying at the arbitration proceeding. They could provide testimony favorable to Brake without fully risking their own interests given their non-party status. Third, Welch's counsel obviously had different motives in cross-examining

Davis, Bethune and Jones since they were appearing merely as witnesses. Had they been appearing as parties, the cross-examinations, and all other aspects of Welch's arbitration strategy, could have been much more searching because they would have involved actual parties to the arbitration.

Even assuming, however, that excluding Davis, Bethune and Jones from the arbitration was harmless error, the court still could not apply that doctrine to defeat Welch's statutory right, whether under the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.*, or the Missouri Arbitration Act ("MAA"), R.S.Mo. § 435.350 *et seq.*, to arbitrate the dispute with the signatory to the arbitration agreement *and* the signatory's agents.[1] The harmless error doctrine has no application in such a situation. That doctrine instead typically applies to appellate review of the admissibility and reception of evidence and other trial-related issues. *See State v. Anglin*, 45 S.W.3d 470, 472 (Mo. App. 2001) ("[f]urthermore, in matters involving the *admission of evidence*, we review for prejudice, not mere error and will reverse only if the error was so prejudicial that it deprived the defendant of a fair trial." (emphasis added) (quoting *State v. Harrison*, 24 S.W.3d 215, 218 (Mo. App. 2000)); *see also* 24 Daniel P. Card II & Alan E. Freed, *Missouri Practice – Appellate Practice* § 3.10 (2d ed. 2001); *State v. Wilson,* 816 S.W.2d 301, 303-04 (Mo. App. 1991)

[1] Under both federal and Missouri law, non-signatory agents are bound by arbitration agreements signed by their principals. *See Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 7 F.3d 1110, 1122 (3d Cir. 1993); *Byrd*, 931 S.W.2d at 815; *Tractor-Trailer*, 873 S.W.2d at 630.

(recognizing that the infringement of certain rights "can never be treated as harmless error"). The case relied on by the Court to support its harmless error reasoning, *Neavill v. Klemp,* 427 S.W.2d 446, 448 (Mo. 1968), in fact involves an issue regarding the admission of evidence at trial and applies the harmless error doctrine in that context. *See id.* at 448. The court was unable to cite a single case that would support the application of the harmless error doctrine to defeat a statutorily-granted right, like the right to a full and fair arbitration granted to Welch under the FAA and the MAA.[2]

Moreover, even if the harmless error doctrine could be said to apply in the circumstances of this case, it could in no event defeat Welch's federally-granted, statutory right to arbitrate this dispute with the signatory, Brake, and his non-signatory agents, Davis, Bethune and Jones. Missouri courts, including the Missouri Supreme Court, have repeatedly made clear that: (1) they are prohibited from applying substantive or procedural state law that is in derogation of federal law; and (2) the FAA preempts inconsistent state law. *See Bunge Corp. v. Perryville Feed & Produce, Inc.,* 685 S.W.2d 837, 839-40 (Mo. 1985) ("The court under the supremacy clause is obligated to apply federal law, and may not apply state law, substantive or procedural, which is in derogation of federal law.") (citation omitted); *Strain-Japan R-16 Sch. Dist. v. Landmark Sys., Inc.,* 51 S.W.3d 916, 920 (Mo. App. 2001); *Group*

[2] The Court did not address the issue of whether the FAA or the MAA applies in this case. Welch, however, demonstrated in his briefing that between the two, the FAA is applicable. (*See* Appellant's Reply Br. (Case No. WD 61731) at 13-14).

Health Plan, Inc. v. B.J.C. Health Sys., Inc., 30 S.W.3d 198, 202 n.2 (Mo. App. 2000); *Duggan v. Zip Mail Servs., Inc.*, 920 S.W.2d 200, 203 (Mo. App. 1996); *Mr. Mudd, Inc. v. Petra Tech, Inc.*, 892 S.W.2d 389, 391-92 (Mo. App. 1995); *Brookfield R-III Sch. Dist. v. Tognascioli Gross Jarvis Kautz Architects, Inc.*, 845 S.W.2d 103, 105 (Mo. App. 1993); *Boogher v. Stifel, Nicolaus & Co., Inc.*, 825 S.W.2d 27, 29 (Mo. App. 1992). Applying a harmless-error analysis to defeat Welch's federal right to arbitration was a direct violation of this principle. The Court was required to give effect to Welch's federal right to arbitration even if a denial of that right could possibly be said to be harmless in the circumstances of this case.

II. Right to Compel Non-Signatory Agents to Arbitrate.

In *Tractor-Trailer Supply Co. v. NCR Corp.*, 873 S.W.2d 627 (Mo. App. 1994), the Court of Appeals for the Eastern District held that a non-signatory agent is bound by an arbitration agreement signed by his or her principal. *Id.* at 630. Two years later, the Court of Appeals for the Western District expressly adopted this rule. *Byrd v. Sprint Communications Co., L.P.*, 931 S.W.2d 810, 815 (Mo. App. 1996). The Court's per curiam opinion, however, disregards both of these holdings.

In its per curiam opinion, the Court candidly acknowledged that it was refusing to follow the decision in the *Byrd* case. The Court stated that it "painted with too broad a brush in *Byrd*." Slip op. at 4 n.1. The Court also indicated that even if Davis, Bethune and Jones were agents of Brake, the rule established in *Byrd* would not apply to this case. *Id.* The Court, in direct conflict with

both *Byrd* and *Tractor-Trailer,* could "discern nothing about that [agency] status that would compel them to submit to arbitration." *Id.*

The holdings in *Byrd* and *Tractor-Trailer* were dispositive of the issue presented by Welch's first appeal. If the record established that Davis, Bethune and Jones were Brake's agents (which it does), the Court could only follow Missouri precedent by compelling Davis, Bethune and Jones to arbitrate with Welch and Brake. By disavowing this established principle of law in Missouri, the Court created a conflict in the case law that is of general interest and importance.

The Court should transfer its opinion to the Missouri Supreme Court not only because the opinion disregarded, and is inconsistent with, existing precedent, but also because the rule it creates is unworkable. Instead of following the clear rule of *Byrd* and *Tractor-Trailer,* the Court held that proper principles of contract and agency law "will, *under the proper circumstances,* permit a party to an arbitration agreement to compel an agent of the other party to arbitrate a dispute although the agent did not enter into the agreement." Slip op. at 4 n.1 (emphasis added). In the future, parties will be left to guess whether a non-signatory agent will be bound to an arbitration agreement signed by his or her principal. The new rule fashioned by the Court simply applies "under the proper circumstances" and provides no meaningful guidance. *Id.*

The Court's opinion not only fails to follow existing precedent, it also purports to overrule it. In place of the well-established and easily-applied rule created in *Byrd* and *Tractor-Trailer,* the Court substitutes a test that has no real meaning for litigants. Welch is entitled to the

benefit of the rule established in *Byrd* and *Tractor-Trailer* and future cases should likewise be guided by that rule.

The controversy created by the Court's opinion is one of general interest and importance because disputes concerning a party's obligation to arbitrate will increase along with the increased popularity of Alternative Dispute Resolution. Transfer should be granted to consider this important issue and remedy the conflicting case law the Court's opinion has created.

III. Attorneys' Ability To Unilaterally Withdraw Client Matters And Extinguish Existing Rights To Attorneys' Fees Under Missouri Law.

Under the Court's opinion – including its interpretation of the arbitration award in favor of Brake and its application of the real-party-in-interest rule – an attorney who has never had a contract for fees with a client is now free to withdraw that client's case from a prior representation *and terminate all existing rights to attorneys' fees* created by the prior representation. This flies in the face of established precedent and fundamentally alters long-standing practices and relationships between Missouri attorneys.

By affirming the trial court's entry of summary judgment in favor of Davis, Bethune and Jones on Welch's *quantum meruit* claim, the Court effectively allowed an attorney who never had a contract with the client at issue to claim a right to the *entirety* of the attorneys' fees earned on the case. Under the Court's holding, the attorney can claim this right even though there are other attorneys who actually have a contractual relationship with the client

that governs attorneys' fees. If this ruling is allowed to stand, the relationship between attorneys in this state who wish to practice together will be fraught with uncertainty.

Brake never had a contract with the client at issue, Kimberly Alcorn, or any of the other 50 plus clients that have cases Brake claims to have "withdrawn." Yet despite this total lack of any contractual right, the Court found that Brake took from Welch any right that Welch had to attorneys' fees generated by the *Alcorn* case. Slip op. at 9. Such a finding, however, is legally and factually impossible because an essential predicate, a contractual right to those fees, is missing.

Welch, on the one hand, and Davis, Bethune and Jones on the other, are the only parties to this dispute who have had a contractual right to the attorneys' fees at issue. To say that Brake "extinguished" Welch's right to the attorneys' fees – the arbitration award in favor of Brake notwithstanding – is nonsensical. Without an underlying contractual right, Brake himself can never hold the right to the attorneys' fees. Instead, the issue of their ownership is between Welch on the one hand and Davis, Bethune and Jones on the other.

Under Missouri law, Welch's prior contingency-fee contract with Alcorn, and the services he rendered during his representation, entitle him to a claim for *quantum meruit*. *See Int'l Materials Corp. v. Sun Corp., Inc.*, 824 S.W.2d 890, 895 (Mo. 1992); *Plaza Shoe Store, Inc. v. Hermel, Inc.*, 636 S.W.2d 53, 59-60 (Mo. 1982). And this claim properly lies against the attorneys who wrongfully hold the fees, *i.e.*, Davis, Bethune and Jones, not Brake.

By ruling as it did, the Court disregarded this fundamental rule of law governing both the relationship between attorneys and the proper recovery of attorneys' fees.

The issue is one of general interest and importance because the legal principles governing the relationships between attorneys, both during and after their association, must be clear, consistent, and logical. Transfer to the Missouri Supreme Court is warranted on this ground as well.

Respectfully submitted,

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IN THE MISSOURI SUPREME COURT

LANTZ WELCH, et al.,	) **No.**
Plaintiffs/Appellants,	)
	) **Circuit Court**
v.	) **No. 01-CV-209224**
	) **WD No. 61089**
GRANT DAVIS, et al.,	) **(Consolidated WD**
Defendants/Respondents.	) **No. 61731)**

APPLICATION FOR TRANSFER

Is transfer sought prior to opinion ___ or after opinion X

The date the record on appeal was filed	April 24, 2002; October 3, 2002
The date the Court of Appeals opinion was filed	June 10, 2003
The date the motion for rehearing was filed and ruled on	June 25, 2003 July 29, 2003
The date the application for transfer was filed in the Court of Appeals and ruled on	June 25, 2003 July 29, 2003

List every party involved in the case, indicate the position of the party in the circuit court (e.g., Plaintiff, Defendant, Intervenor) and in the court of appeals (e.g., Appellant or Respondent), and indicate the name and address of the attorney of record for each party. List first the parties applying for transfer and place a check mark in the space following to indicate each party applying for transfer.

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APPLICATION FOR TRANSFER

Plaintiffs/Appellants Lantz Welch and Lantz Welch, P.C. (collectively, "Welch") respectfully move the Court for its Order transferring this case because of the general interest and importance of the following questions:

1. Under Missouri law, are non-signatory agents bound to arbitration agreements signed by their principals,

as the Court of Appeals for both the Western and Eastern Districts have held in *Byrd v. Sprint Communications Co., L.P.*, 931 S.W.2d 810 (Mo. App. W.D. 1996) and *Tractor-Trailer Supply Co. v. NCR Corp.*, 873 S.W.2d 627 (Mo. App. E.D.1994), or are non-signatory agents bound only "under the proper circumstances[,]" as the court of appeals held in this case as it purported to limit both *Byrd* and *Tractor-Trailer*?

2. May a state appellate court disregard a parties' federally-granted, statutory right to arbitrate a dispute found in the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* (or even the state-granted right in the Missouri Arbitration Act, R.S.Mo. § 435.350 *et seq.*), by simply claiming that the denial of that right is "harmless error" under state law, especially since it is well-established in Missouri case law that state courts cannot apply substantive or procedural state law that is in derogation of federal arbitration law?

3. May only lawyers who actually enter contracts for representation with clients be entitled to attorneys' fees for that representation, or may any other lawyer claim that they are "withdrawing" the cases and thereby gain all rights to attorneys' fees, including those fees attributable to work done before the "withdrawal?"

STATEMENT OF FACTS

Plaintiff/Appellant Lantz Welch – whose accomplishments and contributions to the legal profession and community speak for themselves – has practiced law in Missouri for over 40 years. For many of those 40 years, Welch maintained his active trial practice through his professional corporation, Plaintiff/Appellant Lantz Welch,

P.C. Over the course of the 1980's and 1990's, Defendants/Respondents Timothy L. Brake ("Brake") and Grant Davis, Scott Bethune, and Thomas Jones (collectively "D, B & J") joined Lantz Welch, P.C. and were given the benefit of associating with Welch in the practice of law. Instead of producing their own business, all four lawyers worked on Lantz Welch, P.C. cases. And they did so while Welch: (1) financed the law practice in its entirety; and (2) advanced the funds for, and therefore assumed the entirety of the risk of, the firm's contingent-fee litigation practice.

In December of 2000, Welch was abruptly informed by letter that Brake and D, B & J were all leaving and that Welch's law firm was being taken from him. Brake, who wrote the letter, stated that he was taking all the Lantz Welch, P.C. cases with *him* based on the written contract[1] between Welch and Brake. Although Brake purports to have "withdrawn" all the cases, every single one of the former clients of Lantz Welch, P.C. are now clients of D, B & J through their limited liability company, Davis, Bethune & Jones, L.L.C. Brake has never had a contract with any of the clients at issue.

After commandeering Welch's entire law practice, the Defendants maintained that Welch would not be entitled to any part of the fees those 53 cases might generate. Even though Welch could obtain no meaningful relief from Brake, Welch sought to resolve the dispute with all of the

[1] The written contract also contains an arbitration clause, which makes any dispute under the contract subject to resolution through arbitration.

Defendants in an immediate arbitration. After being led to believe that all of the Defendants were going to take part in that arbitration, Welch was later told that D, B & J – the *real* parties to the dispute – expressly refused to be parties to the arbitration. Welch therefore filed this lawsuit to compel an arbitration with all of the Defendants.

Welch moved to compel Brake to arbitrate based on the arbitration clause in their contract. Welch sought to include D, B & J and their limited liability company based on their status as non-signatory agents or third-party beneficiaries under Missouri law. In response, Brake filed his own application seeking to compel an arbitration between just Brake and Welch. In August 2001, the trial judge at the time granted Brake's application to compel arbitration. A successor trial judge[2] entered a subsequent and separate order in December 2001 denying Welch's

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[2] This case was filed in the Circuit Court of Jackson County and originally assigned to a judge of that court. After the presiding judge entered a blanket recusal order – which he was prohibited from doing under this Court's precedent in *State of Missouri v. Nunley*, 923 S.W.2d 911, 917-18 (Mo. banc 1996) – the case was transferred to senior circuit judge Theodore B. Scott of Buffalo, Missouri. After Judge Scott granted Brake's application, Welch moved for a change of judge. Judge Scott refused to recuse himself until he was ultimately instructed to do so by the Western District. *See State ex rel. Welch v. Scott*, 58 S.W.3d 690 (Mo. App. 2001). The current trial judge, senior circuit judge Frank D. Connett, Jr., of St. Joseph, Missouri, was then appointed to the case and entered the erroneous order denying Welch's application to compel, although even he recognized that "there is a unity of interest between Welch on the one hand and Brake and D, B & J on the other hand and . . . a joint arbitration of all parties would be the best method of resolving the disputes between [the] parties."

application to compel and concluding that D, B & J and their L.L.C. were not required to arbitrate.

The trial court's arbitration rulings only led to a further denial of Welch's attempt to have his case heard. In the arbitration instituted by Brake, the arbitration panel ruled in favor of Brake, even though he was the only party who never held a contract with the clients at issue. D, B & J – seeking purely vicarious success – then moved for summary judgment on Welch's alternative *quantum meruit* claim against them.[3] The trial court granted that motion based on the apparent view that the arbitration award in favor of Brake extinguished the claim.

Welch appealed the trial court's order denying his application to compel an arbitration that included the real parties to this dispute, D, B & J. Welch also appealed the trial court's confirmation of the arbitration award in favor of Brake and the trial court's entry of summary judgment on Welch's remaining *quantum meruit* claim against D, B & J. On appeal, the Western District, in a per curiam opinion, affirmed the trial court. The Western District found that any error in failing to compel D, B & J to arbitrate was harmless. The Western District also upheld the arbitration award in favor of Brake and the entry of summary judgment in favor of D, B & J.

Welch, having been denied the opportunity to have the merits of his case heard, either through an arbitration

[3] D, B & J sought that vicarious success based on Brake's arbitration award despite Grant Davis' prior testimony in a hearing before the trial court that rejected the notion that the result in the arbitration would have a binding effect on them.

with all the parties, or under his alternative *quantum meruit* claim against D, B & J, now seeks relief from this Court.

SUGGESTIONS IN SUPPORT OF APPLICATION

Under the Western District's per curiam opinion, four lawyers who spent the majority of their legal careers working as salaried employees of a long-established law firm can hold a secret meeting and hatch a plot to take over that firm with absolute impunity. Those lawyers can successfully appropriate to themselves the firm's clients and all its existing business, including all fees based on work already done under existing contingent-fee relationships between the firm and its clients. Lantz Welch primarily produced the cases these lawyers took, and Lantz Welch paid all overhead expenses and advances on these cases. Welch, not Brake or D, B & J, provided the financing for the cases and assumed the entirety of the risk of their contingent-fee nature. Not only did Welch finance the firm's operation, but he provided invaluable legal training to D, B & J, the three young and inexperienced lawyers who worked on Lantz Welch, P.C. cases without any personal risk and for a guaranteed income.

Contrary to the impression given by the Western District's opinion, this dispute is not centered on a single case. The Western District focused solely on the *Alcorn* case, which spent almost its entire existence as a Lantz Welch, P.C. case and produced the, $12 million in attorneys' fees that have been awarded to the Defendants. The *Alcorn* case, however, is only the tip of the iceberg; this dispute involves not just *Alcorn,* but 52 similarly-situated cases that may allow Brake and D, B & J to appropriate

millions upon millions of dollars in attorneys' fees without the slightest recognition to Welch.

Not only does the Western District's opinion allow this result, but it does so based on the legal and factual fiction that Brake somehow "withdrew" these cases. In reality, D, B & J effectively "withdrew" the cases, and are using Brake and Brake's contract with Welch to do so without accounting for a cent. This dispute, then, is really between Welch, on the one hand, and D, B & J on the other. Unfortunately, that is the one dispute that will never be squarely faced if the Western District's opinion is allowed to stand.

I. Right to Compel Non-Signatory Agents to Arbitrate.

In *Tractor-Trailer Supply Co. v. NCR Corp.*, 873 S.W.2d 627 (Mo. App. 1994), the Court of Appeals for the Eastern District held that a non-signatory agent is bound by an arbitration agreement signed by his or her principal. *Id.* at 630. Two years later, the Court of Appeals for the Western District expressly adopted this rule. *Byrd v. Sprint Communications Co., L.P.*, 931 S.W.2d 810, 815 (Mo. App. 1996). The Western District's per curiam opinion in this case, however, disregards both of these holdings.

In its per curiam opinion, the Western District candidly acknowledged that it was refusing to follow the decision in the *Byrd* case. The Western District stated that it "painted with too broad a brush in *Byrd*." Slip op. at 4 n.1. The Western District also indicated that even if D, B & J were agents of Brake, the rule established in *Byrd* would not apply to this case. *Id.* The Western District, in direct conflict with both *Byrd* and *Tractor-Trailer*, could

"discern nothing about that [agency] status that would compel them to submit to arbitration." *Id.*

The holdings in *Byrd* and *Tractor-Trailer* were dispositive of the issue presented by Welch's first appeal. If the record established that D, B & J were Brake's agents (which it does), the Western District could only follow Missouri precedent by compelling D, B & J to arbitrate with Welch and Brake. By disavowing this established principle of law in Missouri, the Western District created a conflict in the case law that is of general interest and importance.

The Court should order transfer of the Western District's opinion not only because the opinion disregarded, and is inconsistent with, existing precedent, but also because the rule it creates is unworkable. Instead of following the clear rule of *Byrd* and *Tractor-Trailer,* the Western District held that proper principles of contract and agency law "will, *under the proper circumstances,* permit a party to an arbitration agreement to compel an agent of the other party to arbitrate a dispute although the agent did not enter into the agreement." Slip op. at 4 n.1 (emphasis added). In the future, parties will be left to guess whether a nonsignatory agent will be bound to an arbitration agreement signed by his or her principal.

The Western District's opinion not only fails to follow existing precedent, it also purports to overrule it. In place of the well-established and easily-applied rule created in *Byrd* and *Tractor-Trailer,* the Western District substituted a test that has no real meaning for litigants.

The controversy created by the Western District's opinion is one of general interest and importance because disputes concerning a party's obligation to arbitrate will

increase along with the increased popularity of alternative dispute resolution. Transfer should be granted to consider this important issue and remedy the conflicting case law the Western District's opinion has created.

II. Infringement of Federally-Granted, Statutory Right to Arbitrate Dispute and Preemption of Conflicting State Substantive and Procedural Law.

The Western District found that, even assuming Welch was correct that he was entitled to arbitrate the dispute not just with Brake, but with D, B & J as well, it would not reverse because it could discern no prejudice to Welch. *See* Slip op. at 4. The Western District stated that "[e]ven assuming that excluding D, B & J from the arbitration was error, it was harmless." *Id.* at 5. The Western District, however, erred in applying the harmless error doctrine to defeat Welch's federally-granted statutory right under the Federal Arbitration Act (and state-granted right under the Missouri Arbitration Act, for that matter)[4] to arbitrate this dispute not just with the signatory to the arbitration agreement, but also with that signatory's agents.

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[4] The Western District did not address the issue of whether the FAA or the MAA applies in this case. Between the two, the FAA is applicable. *See Edward D. Jones & Co. v. Schwartz*, 969 S.W.2d 788, 793 (Mo. App. 1998); *Mueller v. Hopkins & Howard, P.C.*, 5 S.W.3d 182 (Mo. App. 1999).

If one were to assume that excluding D, B & J from the arbitration was harmless error[5], the Western District still could not apply that doctrine to defeat Welch's statutory right, whether under the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.*, or the Missouri Arbitration Act ("MAA"), R.S.Mo. § 435.350 *et seq.*, to arbitrate the dispute with the signatory to the arbitration agreement *and* the signatory's agents.[6] The harmless error doctrine has no application in such a situation. That doctrine instead typically applies to appellate review of the admissibility and reception of evidence and other trial-related issues. *See State v. Anglin*, 45 S.W.3d 470, 472 (Mo. App. 2001) ("[f]urthermore, in matters involving the *admission of evidence,* we review for prejudice, not mere error and will reverse only if the error was so prejudicial that it deprived the defendant of a fair trial." (emphasis added) (quoting *State v. Harrison*, 24 S.W.3d 215, 218 (Mo. App. 2000)); *see also* 24 Daniel P. Card II & Alan E. Freed,

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[5] Such an assumption is incorrect to begin with. Welch was prejudiced for several reasons, including the fact that without D, B & J as parties to the arbitration, Welch was prevented from fully explaining to the arbitration panel that it was D, B & J, not Brake, who had withdrawn the cases from Lantz Welch, P.C. Additionally, had D, B & J been appearing as parties, the cross-examinations, and all other aspects of Welch's arbitration strategy, would have taken a different tack because they would have been actual parties to the arbitration with a specific interest to protect. Having lost this essential element, the hearing was miscasted and directly prejudiced the founder of the firm, Lantz Welch.

[6] Under both federal and Missouri law, non-signatory agents are bound by arbitration agreements signed by their principals. *See Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 7 F.3d 1110, 1122 (3d Cir. 1993); *Byrd*, 931 S.W.2d at 815; *Tractor-Trailer*, 873 S.W.2d at 630.

Missouri Practice – Appellate Practice § 3.10 (2d ed. 2001); *State v. Wilson,* 816 S.W.2d 301, 303-04 (Mo. App. 1991) (recognizing that the infringement of certain rights "can never be treated as harmless error"). The case relied on by the Western District to support its harmless error reasoning, *Neavill v. Klemp*, 427 S.W.2d 446, 448 (Mo. 1968), in fact involved an issue regarding the admission of evidence at trial and applies the harmless error doctrine in that context. *See id,* at 448.

Moreover, even if the harmless error doctrine could be said to apply in the circumstances of this case, that doctrine could in no event defeat Welch's federally-granted, statutory right to arbitrate this dispute with the signatory, Brake, and his non-signatory agents, D, B & J. Missouri courts, including this Court, have repeatedly made clear that: (1) they are prohibited from applying substantive or procedural state law that is in derogation of federal law; and (2) the FAA preempts inconsistent state law. *See Bunge Corp. v. Perryville Feed & Produce, Inc.,* 685 S.W.2d 837, 839-40 (Mo. 1985) ("The court under the supremacy clause is obligated to apply federal law, and may not apply state law, substantive or procedural, which is in derogation of federal law.") (citation omitted); *Strain-Japan R-16 Sch. Dist. v. Landmark Sys., Inc.,* 51 S.W.3d 916, 920 (Mo. App. 2001); *Group Health Plan, Inc. v. B.J.C. Health Sys., Inc.,* 30 S.W.3d 198, 202 n.2 (Mo. App. 2000). Applying a harmless-error analysis to defeat Welch's federal right to arbitration was a direct violation of this principle.

III. Attorneys' Ability To Unilaterally Withdraw Client Matters And Extinguish Existing Rights To Attorneys' Fees Under Missouri Law.

Under the Western District's opinion – including its interpretation of the arbitration award in favor of Brake and its application of the real-party-in-interest rule in granting D, B & J' s motion for summary judgment – an attorney who has never had a contract for fees with a client is now free to withdraw that client's case from a prior representation *and terminate all existing rights to attorneys' fees* created by the prior representation. This flies in the face of established precedent, fundamentally alters long-standing practices and relationships between Missouri attorneys, and is patently unfair.

By affirming the trial court's entry of summary judgment in favor of D, B & J on Welch's *quantum meruit* claim, the Western District effectively allowed an attorney who never had a contract with the client at issue to claim a right to the *entirety* of the attorneys' fees earned on the case. Under the Western District's holding, the attorney can claim this right even though there are other attorneys who actually have a contractual relationship with the client that governs attorneys' fees. If this ruling is allowed to stand, the relationship between any and all attorneys in this state who wish to practice together will be fraught with uncertainty, and this new precedent will create a pathway for dispute and controversy.

Under Missouri law, Welch's prior contingency-fee contract with Alcorn, and the services he rendered during his representation, entitle him to a claim for *quantum meruit. See Int'l Materials Corp. v. Sun Corp., Inc.*, 824 S.W.2d 890, 895 (Mo. 1992); *Plaza Shoe Store, Inc. v.*

Hermel, Inc., 636 S.W.2d 53, 59-60 (Mo. 1982). And this claim properly lies against the attorneys who wrongfully hold the fees, *i.e.*, D, B & J, not Brake. By ruling as it did, the Western District disregarded this fundamental rule of law governing both the relationship between attorneys and the proper recovery of attorneys' fees.

The issue is one of general interest and importance because the legal principles governing the relationships between attorneys, both during and after their association, must be clear, consistent, and logical. Transfer is warranted on this ground as well.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document was sent U.S. mail, postage prepaid, this 11th day of August, 2003 to:

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No. 03-903

IN THE

Supreme Court of the United States

LANTZ WELCH and LANTZ WELCH, P.C.,

Petitioners,

v.

GRANT DAVIS, SCOTT BETHUNE, THOMAS JONES, TIMOTHY L. BRAKE, TIMOTHY L. BRAKE, P.C., and DAVIS, BETHUNE & JONES, L.L.C.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MISSOURI, WESTERN DISTRICT

BRIEF IN OPPOSITION

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PARTIES

Respondents submit that Timothy L. Brake and Timothy L. Brake, P.C. have been improperly designated as Respondents in this action. Petitioner is appealing the denial of his application to compel Davis, Bethune, Jones and their law firm, Davis, Bethune & Jones, L.L.C., to arbitrate a dispute over legal fees. To the extent Petitioner sought to have Brake and his professional corporation arbitrate, Petitioner's Application was not denied as Brake and Petitioner participated in an arbitration. The Circuit Court of Jackson County, Missouri only denied the Application to Compel Arbitration as to Respondents Davis, Bethune, Jones and their professional corporation, Davis, Bethune & Jones, L.L.C. *See* Petitioner's App. 16-17. The Arbitration Award in favor of Brake and his professional corporation was confirmed in the Missouri courts and that decision is not being appealed here. The opinion of the Missouri Court of Appeals makes it clear that the issue on appeal was whether the Circuit Court properly denied the Application to Compel Davis, Bethune and Jones to arbitrate, not Brake. *See* Petitioner's App. 4, 13. Therefore, Brake and his professional corporation are not proper parties to the appeal.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondent Davis, Bethune & Jones, L.L.C, states that it has no parent and no publicly held corporation owns any stock in the corporation.

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STATEMENT OF THE CASE

Lantz Welch and Lantz Welch, P.C. (collectively "Petitioner") and Timothy L. Brake and Timothy L. Brake, P.C. (collectively "Brake") began an association of their law practices in 1980. By 1992, Petitioner was no longer actively practicing law. In fact, after 1992, Petitioner only participated in one long-since-resolved case which is not part of this dispute.[1] Contrary to Petitioner's assertions, he did not provide all of the financing for the firm, and Respondents[2] generated and worked on their own cases without assistance or supervision from Petitioner.

The last Agreement between Brake and Petitioner was entered into on January 1, 1992 ("Welch-Brake Agreement"). That Agreement created a contractual relationship between Brake and Petitioner for the sharing of fees and expenses relating to an association of their law practices. The Agreement contained an arbitration provision. At Petitioner's suggestion, paragraph 9 of the Agreement was modified so it read:

> In the event this Agreement is terminated by either party, any law business may be withdrawn by [Brake] with the understanding that [Brake] shall first reimburse [Petitioner] any amounts of monies previously advanced by [Petitioner] on said

1. Petitioner performed no work on any of the cases involved in this dispute over legal fees.

2. As used in this Response, "Respondents" refers to Grant Davis, Scott Bethune and Thomas Jones, and their law firm, Davis Bethune & Jones, L.L.C. It does not include Timothy L. Brake or Timothy L. Brake, P.C.

> matters, and it is understood by [Petitioner] that [Petitioner] shall not participate in any legal fees in said matters . . .

Respondents are not parties to the Welch-Brake Agreement and never made any agreement to arbitrate disputes they may have with Petitioner. None of Respondents are mentioned in the Welch-Brake Agreement. The only mention of what would happen with previously earned, but unrealized, contingency case fees after termination of the Agreement was that "[Petitioner] shall not participate in any legal fees in said matters." At the time the Welch-Brake Agreement containing the arbitration clause was signed, only Respondent Grant Davis was associated with Petitioner and Brake. Respondents were not given the opportunity to be parties to the Welch-Brake Agreement.[3]

Petitioner informed Brake, Davis, Bethune and Jones by memorandum that he intended to breach a prior agreement whereby the actual practicing attorneys (Brake, Davis, Bethune and Jones) would receive all fees after certain overhead costs were covered. Subsequently, Brake informed Petitioner that he was terminating the Welch-Brake Agreement and, "Pursuant to paragraph 9, [Brake] is withdrawing the law business identified on the enclosed list." Brake repaid Petitioner the case advances as required by the Agreement.

Respondents formed their own legal practice and incorporated Davis, Bethune & Jones, L.L.C. ("DBJ, LLC"). Brake joined DBJ, LLC as "of counsel." All of the clients

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3. DBJ, LLC was not in existence when the Welch-Brake Agreement was signed as it was not formed until November 2000.

indicated in writing they wanted Brake, Davis, Bethune and Jones to continue to represent them, and signed contingency fee contracts with the new firm Brake had joined, DBJ, LLC. Brake continued to work on the clients' cases through his association with DBJ, LLC.

The dispute between Petitioner and Brake turned on a question of contract interpretation as to what part of the Welch-Brake Agreement applied to the withdrawn cases. The arbitration panel ruled in Brake's favor and adopted his construction of the Welch-Brake Agreement. The Arbitration Award stated that "all of the law business listed in Exhibit 102 [the withdrawn cases] is governed by paragraph 9 of the January 1, 1992 Agreement and [Petitioner and his professional corporation] are not entitled to participate in any legal fees in any of the matters in the referenced law business." Thus, Petitioner was found to possess no legally cognizable interest in the case fees that were in dispute.

The only issue Petitioner asks this Court to review is whether the Missouri Court of Appeals improperly utilized the harmless error doctrine in affirming the decision denying Petitioner's Application to Compel Respondents to arbitrate. The Arbitration Award in favor of Brake was confirmed and is not being appealed here. The Award concluded that Petitioner has no interest in the previously earned legal fees from any of the withdrawn cases regardless of who Petitioner makes a claim against for those fees. Because Petitioner lacks any interest in the fees, the Missouri Court of Appeals affirmed the grant of summary judgment in Respondents' favor on Petitioner's *quantum meruit* claim for a share of the fees. For the same reason, any arbitration between Petitioner and Respondents would be a futile exercise, which is why the Missouri Court of Appeals concluded that

Petitioner could not have been prejudiced when his request to compel Respondents to arbitrate was denied.

REASONS FOR DENYING THE PETITION

I. The Petition for Writ of Certiorari should be denied because Petitioner contracted away all rights to fees and lacks a legally cognizable interest in the legal fees he seeks; therefore, the appeal is moot and this Court lacks jurisdiction.

Federal courts lack jurisdiction to decide moot cases because their constitutional authority extends only to actual cases or controversies. *DeFunis v. Odegaard*, 416 U.S. 312, 316, 94 S.Ct. 1704, 1705, 40 L.Ed.2d 164 (1974); U.S. Constitution, Art. III, § 2. Article III denies federal courts the power "to decide questions that cannot affect the rights of the litigants in the case before them." *North Carolina v. Rice*, 404 U.S. 244, 246, 92 S.Ct. 402, 404, 30 L.Ed.2d 413 (1971). A case is moot when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome. *County of Los Angeles v. Davis*, 440 U.S. 625, 631, 99 S.Ct. 1379, 59 L.Ed.2d 642 (1979) (quoting *Powell v. McCormack*, 395 U.S. 486, 496, 89 S.Ct. 1944, 23 L.Ed.2d 491 (1969)). It has long been settled that a federal court has no authority "to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it." *Mills v. Green*, 159 U.S. 651, 653, 16 S.Ct. 132, 133, 40 L.Ed. 293 (1895). *See also Preiser v. Newkirk*, 422 U.S. 395, 401, 95 S.Ct. 2330, 2334, 45 L.Ed.2d 272 (1975); *North Carolina v. Rice*, 404 U.S. 244, 246, 92 S.Ct. 402, 404, 30 L.Ed.2d 413 (1971).

Since the arbitration between Petitioner and Brake conclusively established that Petitioner has no interest in the attorney fees from the withdrawn cases, Petitioner has no legally cognizable interest in any claim for fees against Respondents that could be subject to arbitration. The lack of such an interest renders this appeal moot and renders purely academic the question of whether the harmless error doctrine may be applied to cases arising under 9 U.S.C. § 1, *et seq*. of the Federal Arbitration Act ("FAA"). Consequently, this Court lacks any jurisdiction to hear this appeal, and this Petition for Writ of Certiorari should be denied.

The arbitration of the dispute over the case fees took place after Petitioner's Application to Compel Arbitration was denied. The issue submitted to the arbitrators was whether paragraph 9 of the Welch-Brake Agreement, which divested Petitioner of any interest in the fees, applied to the cases in dispute. The arbitrators issued an Arbitration Award in which they ruled that all of the cases in dispute were "governed by paragraph 9 of the January 1, 1992 Agreement and [Petitioner] [is] not entitled to participate in any legal fees paid in any of the matters in the referenced law business." Respondents' App. 1. Thus, the arbitrators ruled that under the Welch-Brake Agreement Petitioner is not entitled to a share of the fees from the cases in dispute. The Arbitration Award was confirmed by the Circuit Court of Jackson County, Missouri and the Missouri Court of Appeals, and is not subject to review by this Court.

Petitioner's claim against Respondents was one for *quantum meruit* for the value of services provided on cases prior to the clients' termination of their existing contracts and retention of DBJ, LLC. The confirmed Arbitration Award is a final judgment that Petitioner is not entitled to any fees

for services performed prior to the clients' termination of their contingency fee contracts.[4] In paragraph 9 of the Welch-Brake Agreement, Petitioner contractually relinquished any right he had in such fees to Brake. Because Petitioner has no right to participate in any of the contested fees, he cannot prevail upon any theory against Respondents even if the Court were to grant his requested relief and require Respondents to arbitrate Petitioner's claim against them.[5] Consequently, the arbitration panel's ruling that Petitioner has no interest in the fees makes this appeal of the denial of Petitioner's Application to Compel Arbitration moot. When events take place, including another arbitration ruling, that render moot whether an application to compel arbitration was properly denied, the appeal should be dismissed. *See Pipe Trades Council of Northern California v. Underground Contractors Ass'n of Northern California*, 835 F.2d 1275 (9th Cir. 1988) (arbitrator's ruling on jurisdictional agreement in separate arbitration rendered moot appellant's claim that its application to compel arbitration was improperly denied); *Briggs & Stratton Corp. v. Local 232*, 36 F.3d 712 (7th Cir. 1994) (union's appeal of injunction was moot where arbitrator's ruling caused injunction to lapse); *IBTCWHA, Local Union No. 2702 v. Western Air Lines, Inc., et al.*, 854

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4. While Petitioner is quick to point out the strong federal policy encouraging arbitration, he ignores the resulting deference that a confirmed arbitration award is given as Petitioner seeks to obtain a different result in an arbitration against Brake's alleged agents than he received in the arbitration against Brake.

5. Recognizing Petitioner's inability to state a claim for a share of the fees, the Circuit Court granted Respondents' Motion for Summary Judgment dismissing Petitioner's claims against Respondents and the Missouri Court of Appeals affirmed that judgment.

F.2d 1178 (9th Cir. 1988) (union's appeal of an order denying an application to compel arbitration was moot where merger took place which made it impossible to grant any relief that would have been sought in the arbitration).

The fact that Respondents were not parties to the arbitration makes no difference in the ability of the arbitrators to determine that Petitioner gave up his right to fees under paragraph 9 of the Welch-Brake Agreement. Since the dispute over whether Petitioner or Brake was entitled to the fees was a question of contract interpretation, the presence or absence of Brake's alleged agents as additional named parties was completely irrelevant to the interpretation of the Welch-Brake Agreement. Petitioner can present no logical reason why the inclusion of Respondents as parties would alter the result.[6] Respondents, unlike Lantz Welch, all appeared personally at the arbitration and gave testimony. The fact that Respondents' names were not in the arbitration caption has no bearing on the ability of the arbitration panel to determine whether Petitioner contractually waived his right to fees in the Welch-Brake Agreement. Since a legally cognizable interest in the disputed fees is a necessary prerequisite for Petitioner to bring a claim for the fees against Respondents, the arbitrators would never have reached Petitioner's claim, even if Respondents had been parties.

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6. In order to find a reason to justify inclusion of Respondents in the Welch-Brake arbitration, Petitioner claims he was deprived of the opportunity to present the merits of his position against Respondents. This is not accurate. Petitioner was not prohibited from making any argument at the arbitration. Contrary to Petitioner's assertions, he was allowed to, and did, argue that Respondents, and not Brake, had withdrawn the cases. The arbitrators rejected this argument. Because of this, the Missouri Court of Appeals could not find any reason why compelling Respondents to be named as parties to the arbitration was necessary to establishing the basis of Petitioner's dispute with Brake. Petitioner's App. 7.

Petitioner's ability to make a claim for fees against Respondents was dependent upon his prevailing on the contract dispute with Brake. Even if Respondents were ordered to arbitrate with Petitioner now, the arbitrators' decision of law that Petitioner waived his right to fees in paragraph 9 of the Welch-Brake Agreement would still be a binding judgment and would preclude re-litigating that issue.[7] Without a right to participate in fees, Petitioner is precluded from maintaining a claim for the value of legal services performed prior to the clients' contracting with DBJ, LLC. Consequently, since the Arbitration Award in favor of Brake is final and that decision is not being appealed here, this appeal is moot since Petitioner has no right to maintain an action against Respondents for a share of the fees.

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7. Because of the arbitration decision, an arbitration between Respondents and Petitioner could not possibly result in a recovery by Petitioner. If Petitioner were able to maintain an action to recover a share of the legal fees from DBJ, LLC for the reasonable value of the services performed prior to the clients' termination of their contracts, Brake could intervene based on the Arbitration Award and demand the fees be paid to him. Since Brake and DBJ, LLC are in possession of the fees at issue, there is no reason to require the parties to go through such proceedings to reach the same point.

II. The Missouri Court of Appeals' application of the harmless error doctrine does not present any basis for review by this Court.

In an attempt to concoct a basis for appealing the Missouri Court of Appeals' decision to this Court, Petitioner asserts that a "state law principle," the harmless error doctrine, was used to defeat his federal right to arbitrate under the FAA. Petition for Writ of Certiorari at p. 7. First, the concept of harmless error is not merely a state court concept. Rather, it is a universally applied principle of jurisprudence based on the sound axiom that error without prejudice is not reversible error. Federal courts are required by rule and statute to apply harmless error analysis to all cases and all appeals to avoid additional unnecessary proceedings. The Missouri Court of Appeals' reference to this doctrine was completely consistent with federal law and principles announced by this Court. Second, the Missouri Court of Appeals' reference to harmless error was not the primary basis for determining that Respondents were not required to arbitrate. Rather, prior to referencing harmless error, the Court found that the alleged agency status of Respondents was not of the type that would require these non-signatories to be subject to the arbitration agreement between Petitioner and Brake. Third, there is no conflict between the Missouri Court of Appeals' decision and decisions of other federal courts or this Court. Fourth, and finally, the unusual set of circumstances which rendered moot the issue of whether Respondents were required to arbitrate is unlikely to reoccur, so there is no compelling reason for the Court to grant certiorari.

A. All federal courts are required to perform a harmless error analysis when reviewing a case on appeal; therefore, the Missouri Court of Appeals did not violate the notion of federal preemption or the Federal Arbitration Act in relying on the harmless error doctrine.

Petitioner argues that federal law, specifically § 2 of the FAA,[8] preempts the application of a judicial doctrine, such as harmless error, from being used by a state court to deny a right to arbitrate. Petition for Writ of Certiorari at pp. 10-11. Not only is this position unsupported by any judicial authority, it directly conflicts with federal law that requires all federal courts to conduct harmless error analysis.

This Court has strongly supported the application of harmless error analysis for over fifty years. *See Kotteakos v. United States*, 328 U.S. 750, 759-60, 66 S.Ct. 1239, 1245-46, 90 L.Ed. 1557 (1946). Federal Rule of Civil Procedure, Rule 61 was adopted in 1937 and required that district courts perform a harmless error analysis in determining ruling on motions for new trials. Appellate courts have been instructed by this Court to "act in accordance with the salutary policy embodied in Rule 61." *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548, 554, 104 S.Ct. 845, 849, 78

8. Petitioner's sole basis for federal jurisdiction is the application of the FAA. No determination was ever made by any court that the FAA applied to the arbitration agreement at issue. Petitioner argued for the FAA's application for the first time on appeal. However, Petitioner failed to make any record in state court supporting his position that the FAA, and not Missouri's Arbitration Act, applied to the Welch-Brake Agreement. Nevertheless, Respondents will assume for purposes of this Response that the FAA is applicable.

L.Ed.2d 663 (1984). "Congress has further reinforced the application of Rule 61 by enacting the harmless error statute, 28 U.S.C. § 2111, which applies directly to the appellate courts and which incorporates the same principles found in Rule 61." *Id.* 28 U.S.C. § 2111 provides as follows:

> On the hearing of *any appeal* or writ of certiorari in *any case*, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.

(Emphasis added.)

Given this federal mandate to conduct a harmless error analysis on "any appeal" and in "any case," the Missouri Court of Appeals did not violate federal law or the notion of federal preemption in applying such an analysis in this case. To the contrary, the Missouri Court of Appeals acted in a manner completely consistent with federal law which requires such analysis. Had Petitioner brought his action to compel arbitration in the federal courts, those courts, both district and appellate, would have been required to conduct a harmless error review. Indeed, this Court would have to conduct the same analysis (and undoubtedly would reach the same conclusion) were the Petition for Writ of Certiorari granted.

Petitioner's secondary argument, that the harmless error "principle" should not be used in reviewing a decision denying a motion to compel arbitration is also unsupported by any authority and is directly contrary to the harmless error statute. The federal harmless error statute applies to "any case" and on "any appeal." The statute was enacted in 1949,

twenty-four years after the FAA. Had Congress wanted to exempt the FAA from harmless error analysis, it was perfectly capable of doing so. Given the fact that the harmless error statute was decreed to apply in *all* cases before all federal appellate courts, it certainly could not have been error to apply it here if the FAA governed this arbitration agreement.[9]

B. The Missouri Court of Appeals' decision that Respondents were not required to arbitrate was based primarily on the lack of agency status and that decision is not reviewable by this Court.

While Petitioner seeks to have this Court determine whether harmless error analysis should be used in reviewing decisions denying applications to compel arbitration, he fails to acknowledge that the Missouri Court of Appeals' decision was based primarily on the fact that Respondents, non-signatories to any arbitration agreement, were found to not have had the requisite agency status that would require them to arbitrate. The Missouri Court of Appeals' harmless error analysis was merely cumulative of this prior finding and was not the basis for the decision. Consequently, review of the decision for the reason raised by Petitioner is unnecessary.

Petitioner originally sought to compel Brake, Davis, Bethune, Jones and DBJ, LLC to arbitrate his dispute over legal fees after Brake had withdrawn cases pursuant to the Welch-Brake Agreement. Petitioner argued that Respondents

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9. While Petitioner argues that in cases applying the FAA in state courts the courts cannot perform a harmless error analysis, he never addresses the fact that federal courts applying the FAA would be required to do that very thing because of 28 U.S.C. § 2111. Such an incongruous result offends the very notion of federal preemption as well as common sense.

were required to arbitrate because they were either Brake's agents or were third-party beneficiaries to the Welch-Brake Agreement. The Missouri Court of Appeals, prior to mentioning harmless error, stated that:

> Those principles [of contract and agency law] will, under the proper circumstances, permit a party to an arbitration agreement to compel an agent of the other party to arbitrate a dispute although the agent did not enter into the agreement. Assuming that [Respondents] were agents – the record does not establish clearly that they were – *we discern nothing about the status that would compel them to arbitration.*

Petitioner's App. 5 n.1 (Emphasis added).

The Missouri Court of Appeals' finding that there was nothing about the alleged agency relationship that would require Respondents to arbitrate Petitioner's dispute was supported by the record which included the fact that the Welch-Brake Agreement made no mention of Respondents, made no reference to compensating or sharing fees with other attorneys, Respondents were not trying to enforce any provisions of the Welch-Brake Agreement, and the scope of Respondents' agency, if any, did not involve or relate to how Petitioner and Brake would divide fees. Consequently, the Missouri Court of Appeals correctly decided, prior to application of the harmless error doctrine, that Respondents could not be compelled to arbitrate Petitioner's dispute over legal fees from the withdrawn cases. Since the Missouri Court of Appeals' decision is supported without resort to the harmless error doctrine, Petitioner's claim that the doctrine was erroneously applied need not, and should not, be reached.

C. The lack of a reference to harmless error in other decisions concerning the FAA does not create a conflict between the Missouri Court of Appeals' decision and decisions of other federal courts.

Petitioner claims to have found a conflict between the Missouri Court of Appeals' decision and federal court decisions. The alleged conflict derives from the absence of a reference to harmless error in other court decisions involving the FAA rather than from any statement in any opinion that harmless error should not be applied to a decision denying an Application to Compel Arbitration. The fact that other courts have not faced situations where harmless error analysis needed to be addressed in determining whether to compel arbitration does not create a conflict between the federal courts and the Missouri Court of Appeals' decision.

For there to be an actual conflict between other appellate courts and the Missouri Court of Appeals, Petitioner would need to show that some courts have determined that harmless error analysis should not be applied to a case involving § 2 of the FAA. Petitioner failed to do so and research by Respondents has discovered no such decisions. Silence is not dissent and Petitioner's inability to present any decisions, state or federal, that would find the Missouri Court of Appeals' use of the harmless error doctrine erroneous makes his claim of conflict unpersuasive. Of course, given the fact that federal courts are required to conduct a harmless error analysis under Rule 61 and 28 U.S.C. § 2111, and the general "salutary" purpose of the doctrine to prevent unnecessary litigation, the absence of actual conflicting opinions in which a court determined harmless error analysis could not be used in a case involving the FAA is not surprising.

D. The application of harmless error to decisions concerning § 2 of the Federal Arbitration Act presents no issue warranting certiorari.

Petitioner argues that the application of the harmless error doctrine presents an issue of "great legal and practical importance" and raises fears that the federal policy supporting arbitration will begin to crumble should the decision stand. To say that Petitioner greatly overstates the significance of the Missouri Court of Appeals' ruling would be an understatement.

As a practical matter, harmless error is seldom going to be the basis for supporting a decision denying an application to compel arbitration. Indeed, the absence of any other case involving even a mention of harmless error in considering issues raised by § 2 of the FAA causes Petitioner's alarm to ring hollow. Very rarely would a separate arbitration decision render one of the party's claims against those who were not compelled to arbitrate moot because the losing party lost his right to make the claim in the arbitration decision. However, should it occur again, it would be perfectly appropriate for a court to apply harmless error analysis since there is no logical reason for requiring the excluded parties from arbitrating with the loser when the loser has already been determined not to have any rights to recover against the excluded parties.

There is also no reason to believe that application of harmless error analysis will undermine judicial support for arbitration. One of the major reasons arbitration is encouraged is that it saves time and resources. Application of the harmless error doctrine merely prevents the referral of some matters to arbitration when circumstances have made arbitration pointless. Saving arbitrators from wasting time on futile

disputes so they may concentrate on cases with actual controversies will not work any violence to this principle.

Finally, the Missouri Court of Appeals' decision was not the travesty Petitioner makes it. Rather, it was the proper application of one of the most basic and universal principles of judicial review. The harmless error doctrine is applied by both state and federal courts and, indeed, must be applied by federal courts to all cases pursuant to federal rule and statute. The right to arbitrate does not include the right to have arbitrators and courts continue to hear matters when the party seeking to compel arbitration has no interest in the claim he seeks to litigate.

III. The Federal Arbitration Act should not apply in state court cases as it provides only procedural, and not substantive, rights; therefore, this Court lacks jurisdiction.

Petitioner is appealing the decision of the Missouri Court of Appeals' affirming the denial of his Application to Compel Respondents to arbitrate which was originally brought in a Missouri state court. Petitioner relies on the application of the FAA as the basis for overturning the Missouri Court of Appeals' decisions on the premise that the FAA applies to the Welch-Brake Agreement and preempts state laws, including the use of the harmless error doctrine, which may limit his "federal" right to arbitrate. Respondents submit that the FAA is a procedural statute and should apply only to actions in federal courts. Consequently, this Court does not have jurisdiction to hear this appeal.

Petitioner relies on this Court's decision in *Southland Corp. v. Keating*, 465 U.S. 1, 104 S.Ct. 852, 79 L.Ed.2d 1 (1984) as the basis for permitting this Court to resolve a dispute involving the FAA that was brought in a state court. Petition for Writ of Certiorari at p. 9. *Southland* was the first decision by this Court finding that the FAA applied to state court actions. Respondents respectfully suggest that this decision was wrongly decided and should be reversed for the reasons put forward by Justice O'Connor in her dissent in *Southland*, 465 U.S. at 21-36, 104 S.Ct. at 864-87 (Rehnquist, J. concurring in dissent), and Justice Thomas in his dissent in *Allied Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265, 285-97, 115 S.Ct. 834, 845-51, 130 L.Ed.2d 753 (1995) (Scalia, J. concurring in dissent).

CONCLUSION

For all of the foregoing reasons, Respondents request that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX — ARBITRATION AWARD

IN ARBITRATION BEFORE MARK KEMPTON, JOHN M. EDGAR AND MAX FOUST

TIMOTHY L. BRAKE and
TIMOTHY L. BRAKE, P.C.,

Plaintiffs,

v.

LANTZ WELCH and
LANTZ WELCH, P.C.,

Respondents.

ARBITRATION AWARD

This matter came on for arbitration before the panel of arbitrators on April 8 and 9, 2002, in Kansas City, Missouri. The arbitration was conducted on the record and based on the evidence and exhibits presented by the parties, including the following:

1. The 1992 Agreement between Lantz Welch, P.C. and Timothy L. Brake, P.C., executed on behalf of those professional corporations and by Lantz Welch individually and Timothy L. Brake individually.

2. Claimants' Statement of Claim.

3. Respondents' Answering Statement.

Appendix

Having heard the testimony of the witnesses and reviewing the exhibits provided, the award of the panel is as follows if agreed to by two or more of them:

All of the law business listed in Exhibit 102 is governed by paragraph 9 of the January 1, 1992 Agreement and Respondents are not entitled to participate in any legal fees paid in any of the matters in the referenced law business.

Agree X Disagree __	**Mark Kempton**	/s/ Mark Kempton
Agree X Disagree __	**John M. Edgar**	/s/ John M. Edgar
Agree __ Disagree X	**Max Foust**	/s/ Max Foust

Done this 10th day of April, 2002 at Kansas City, Missouri

(3)

No. 03-903

Supreme Court, U.S.
FILED
MAR 1 - 2004
OFFICE OF THE CLERK

In The
Supreme Court of the United States

LANTZ WELCH and LANTZ WELCH, P.C.,

Petitioners,

vs.

GRANT DAVIS, SCOTT BETHUNE, THOMAS JONES, TIM BRAKE, TIM BRAKE, P.C. and DAVIS, BETHUNE & JONES, L.L.C.,

Respondents.

On Petition For Writ Of Certiorari To The Missouri Court Of Appeals – Western District

REPLY BRIEF OF PETITIONERS

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PARTIES

Contrary to Respondents' argument, Timothy L. Brake and Timothy L. Brake, P.C. (collectively, "Brake") are indeed proper parties to this appeal and, therefore, properly designated as Respondents in this action. Respondents flagrantly misstate the record by claiming that Petitioners Lantz Welch and Lantz Welch, P.C.'s (collectively, "Welch") application to compel arbitration was not denied as to Brake. Welch's application – which sought an arbitration with all Respondents – was denied in its entirety. (App. to Pet. for Writ of Cert. 16-21, 31-48). The arbitration that did take place between Welch and Brake alone was the result of a competing application to compel arbitration filed by Brake, which the trial court granted. (App. to Pet. for Writ of Cert. 14-15). Welch's appeal is therefore from the denial of an arbitration with *all* Respondents as parties. Because the question whether Welch's application should have been granted instead of Brake's is still at issue, the validity of the arbitration award in favor of Brake alone also remains at issue. *See infra* at 1-3.

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REPLY BRIEF OF PETITIONERS

I. The Arbitration Award in Favor of Brake Does Not Prevent the Court From Reaching the Question Presented By Welch's Petition.

Respondents' Brief in Opposition attempts to divert the Court's attention from the question presented for review by improper reliance on the arbitration award in favor of Brake. The attempts begin at the outset with the incorrect claim that Brake is not a proper party to this appeal based on the arbitration award. They continue in Respondents' Statement of the Case, where Respondents contend that the arbitration award in favor of Brake is unassailable and that any arbitration between Welch and Davis, Bethune and Jones would therefore be a futile exercise.[1] And this same theme lives on through the first five pages of Respondents' argument, where Respondents claim that the arbitration award renders the case moot.

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[1] Respondents' misleading account of the background of this case does not end with their improper reliance on the arbitration award in favor of Brake. That account continues with the claim that Welch no longer actively practices law. The claim is ironic given that Respondents arrogated to themselves the law practice that Welch spent 40 years building. Respondents also allege that Welch performed no work on any of the cases involved in the present dispute. This argument ignores, however, that all of the cases at issue were handled as Lantz Welch, P.C. cases before Respondents terminated their relationship with Welch. The work that Respondents performed on the cases was therefore done on behalf of Welch's firm, which is entitled to the reasonable value of the services it performed. In his Petition, Welch placed the amount at issue on this point at over $50 million. (Pet. for Writ of Cert. 3 n.1). Respondents did not even attempt to dispute this figure in their opposition.

The arbitration award in favor of Brake, however, does not prevent the Court from reaching the important question presented by Welch's petition. The fatal flaw with Respondents' reliance on the arbitration award to foreclose review is its false assumption that the validity of the award is not an open question.

If this Court grants review and determines that the Missouri Court of Appeals erred in its application of the harmless error doctrine, the issue of whether Welch's application should have been granted will remain for decision. Welch's application sought an arbitration not just with Brake, but with Davis, Bethune and Jones as well. If it is ultimately determined that Welch's application should have been granted – and the dispute submitted to a single arbitration – the trial court's order granting Brake's competing application would be reversible error. Under such circumstances, the arbitration between Welch and Brake alone should never have taken place and should be vacated. *See Laborers' Int'l Union of N. Am., AFL-CIO v. Foster Wheeler Corp.*, 26 F.3d 375, 401-02 (3d Cir. 1994) (remanding with instructions that district court compel not just some, but all parties involved in dispute to submit to arbitration); *McAllister Bros., Inc. v. A & S Transp. Co.*, 621 F.2d 519, 524 (2d Cir. 1980) (same); *In re Globe Seaways, Inc.*, 337 F.Supp. 26, 29 (S.D.N.Y. 1971), *aff'd*, 451 F.2d 1159 (2d Cir. 1971) (ordering that incorrectly entered arbitration would be vacated); *see also Madden v. Ellspermann*, 813 S.W.2d 51, 52, 54 (Mo. App. 1991) (reversing order denying arbitration as to only one of two defendants and remanding with directions that all parties submit the dispute to arbitration).

Respondents' reliance on *Briggs & Stratton Corp. v. Local 232, International Union, Allied Industrial Workers*

of America (AFL-CIO), 36 F.3d 712 (7th Cir. 1994), *IB-TCWHA, Local Union No. 2702 v. Western Air Lines, Inc.*, 854 F.2d 1178 (9th Cir. 1988), and *Pipe Trades Council of Northern California, U.A. Local 159 v. Underground Contractors Association of Northern California*, 835 F.2d 1275 (9th Cir. 1987), to support their mootness argument does not alter this result. Although all three cases correctly recognize that an arbitration issue, like any issue, can be rendered moot, none of those cases address the type of situation present in this case. Unlike here, where the validity of the arbitration award in favor of Brake is an open question, there was no indication in either *Briggs & Stratton*, *IBTCHWA*, or *Pipe Trades Council* that the very foundation for the mootness claim was still at issue. Those cases instead treat the validity of the event rendering the arbitration moot as a foregone conclusion. Their findings of mootness on appeal therefore have no application in this case.

Respondents' attempt to prematurely foreclose review by relying on the arbitration award in favor of Brake is baseless. This case presents a controversy involving the right to arbitration under the Federal Arbitration Act ("FAA"), 9 U.S.C. 1 *et seq.* that is very much alive. It is therefore an appropriate vehicle to address the question presented for review and the conflict created by the Missouri Court of Appeals' application of the harmless error doctrine.

II. The Missouri Court of Appeals' Rejection of the Right to Arbitration Under the FAA Based on Harmless Error Analysis Directly Conflicts With This Court's Precedent.

Respondents are unable to explain away the direct conflict between this Court's precedent and the Missouri Court of Appeals' application of the harmless error doctrine under Missouri law to defeat the right to arbitration found in the FAA. The most Respondents can muster on this point is to claim that the federal-harmless-error statute, 28 U.S.C. § 2111, justifies the Missouri Court of Appeals' use of harmless error analysis. This argument, however, demonstrates a fundamental misunderstanding of the harmless error doctrine.

This Court's precedent establishes that certain errors are "structural" and therefore outside the reach of harmless error analysis. *See, e.g., Arizona v. Fulminante*, 499 U.S. 279, 309-10 (1991). In *Fulminante*, the Court identified a class of "structural defects . . . which defy analysis by 'harmless error' standards." *Id.* at 309. Under this rationale, the Court has identified various errors that simply cannot be classified as harmless. *See Neder v. United States*, 527 U.S. 1, 8 (1999) (collecting cases). Even beyond these cases, which involve application of the harmless error doctrine to *trial errors*, there is simply no basis to conclude that harmless error analysis can be applied to defeat a right like the statutory right to arbitration found in the FAA. And Respondents, unsurprisingly, do not cite a single case to support such a proposition.

In addition to being inconsistent with this Court's precedent, Respondents' argument that 28 U.S.C. § 2111 is a federal mandate to conduct harmless error analysis on "any appeal" and in "any case" grossly mischaracterizes

the operation of that statute. Respondents conveniently ignore the language in § 2111 that renders the statute applicable only to "errors or defects which do not affect the substantial rights of the parties." 28 U.S.C. § 2111. This language squares the statute with the notion that harmless error analysis is simply inapplicable to certain errors.

In addition to their specious arguments based on § 2111, Respondents attempt to minimize the role of the Missouri Court of Appeals' harmless error analysis in an effort to avoid review. Respondents claim that the court of appeals' decision was "based primarily" on agency law. But the court of appeals' opinion tells a different story. The court of appeals passed over the agency issue by simply assuming a result without a full analysis. (App. to Pet. for Writ of Cert. 5). Indeed, the court of appeals' entire discussion of the agency issue was relegated to a single footnote because of the harmless error finding. Even setting the agency issue aside, the court of appeals completely ignored Welch's other argument that Davis, Bethune and Jones were compelled to arbitrate based on their status as third-party beneficiaries under the arbitration agreement. (*Id.*) The third-party beneficiary argument was instead usurped by the harmless error finding. Accordingly, any claim that the court of appeals' application of the harmless error doctrine did not dictate the outcome on Welch's right to arbitration under the FAA is disingenuous.

III. The Court of Appeals' Application of the Harmless Error Doctrine Creates a Conflict in Both the State and Federal Appellate Courts.

Respondents fail to meaningfully respond to Welch's showing that the court of appeals' decision creates a conflict in the United States courts of appeals and state

courts of last resort. Respondents have no answer but to say that the numerous decisions cited by Welch do not expressly refuse to apply harmless error analysis to the right to arbitration found in the FAA. But the type of conflict warranting review in this Court is created by different outcomes in different courts. And that is precisely how the court of appeals' decision operates. The court of appeals' opinion is in direct conflict with the cases cited by Welch from other jurisdictions that have never applied harmless error analysis to defeat the right to arbitration found in the FAA. That the federal and state appellate cases outside of Missouri do not explicitly reason that the harmless error doctrine cannot be applied in such a manner does not detract from the conflict that exists. That fact instead serves only to demonstrate how wrong the court of appeals was in applying harmless error analysis to discard Welch's claim that he was denied his right to arbitrate under the FAA.

IV. This Case is Appropriate for Review.

This case squarely presents an important and recurring question that will affect the continued vitality of the statutory right to arbitration found in the FAA. The strong federal policy in favor of arbitration is defeated by the result reached in this case. And the issue will arise whenever an appellate court finds error in a lower court's arbitration ruling under the FAA. Moreover, the conflict between the court of appeals' decision and other jurisdictions is real and substantial. Left untouched, the court of appeals' decision will open the door for courts to simply claim harmless error when faced with difficult arbitrability issues under the FAA.

CONCLUSION

For the foregoing reasons and those stated in the Petition, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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